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OMB NO. 1124-0002; Expires February 28, 2014

U.S. Department of Justice
Washington, DC 20530

Supplemental Statement
Pursuant to the Foreign Agents Registration Act of 1938, as amended

For Six Month Period Ending 9/30/2012
(Insert date)

I - REGISTRANT

1. (a) Name of Registrant

White & Case LLP

(b) Registration No.

2759

(c) Business Address(es) of Registrant
1155 Avenue of the Americas
New York, New York 10036

2. Has there been a change in the information previously furnished in connection with the following?

(a) If an individual:

(1) Residence address(es)	Yes ☐	No ☐
(2) Citizenship	Yes ☐	No ☐
(3) Occupation	Yes ☐	No ☐

(b) If an organization:

(1) Name	Yes ☐	No ☒
(2) Ownership or control	Yes ☒	No ☐
(3) Branch offices	Yes ☐	No ☒

(c) Explain fully all changes, if any, indicated in Items (a) and (b) above.
Item 2(b)(2) Changes in Partnership are indicated in Item 4

IF THE REGISTRANT IS AN INDIVIDUAL, OMIT RESPONSE TO ITEMS 3, 4, AND 5(a).

3. If you have previously filed Exhibit C[1], state whether any changes therein have occurred during this 6 month reporting period.

Yes ☐ No ☒

If yes, have you filed an amendment to the Exhibit C? Yes ☐ No ☐

If no, please attach the required amendment.

1 The Exhibit C, for which no printed form is provided, consists of a true copy of the charter, articles of incorporation, association, and by laws of a registrant that is an organization. (A waiver of the requirement to file an Exhibit C may be obtained for good cause upon written application to the Assistant Attorney General, National Security Division, U.S. Department of Justice, Washington, DC 20530.)

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4. (a) Have any persons ceased acting as partners, officers, directors or similar officials of the registrant during this 6 month reporting period?

Yes ☒ No ☐

If yes, furnish the following information:

Name	Position	Date Connection Ended
SEE ATTACHED PAGES		

(b) Have any persons become partners, officers, directors or similar officials during this 6 month reporting period?

Yes ☒ No ☐

If yes, furnish the following information:

Name	Residence Address	Citizenship	Position	Date Assumed
SEE ATTACHED PAGES				

5. (a) Has any person named in Item 4(b) rendered services directly in furtherance of the interests of any foreign principal?

Yes ☐ No ☒

If yes, identify each such person and describe the service rendered.

(b) During this six month reporting period, has the registrant hired as employees or in any other capacity, any persons who rendered or will render services to the registrant directly in furtherance of the interests of any foreign principal(s) in other than a clerical or secretarial, or in a related or similar capacity? Yes ☐ No ☒

Name	Residence Address	Citizenship	Position	Date Assumed

(c) Have any employees or individuals, who have filed a short form registration statement, terminated their employment or connection with the registrant during this 6 month reporting period? Yes ☐ No ☒

If yes, furnish the following information:

Name	Position or Connection	Date Terminated

(d) Have any employees or individuals, who have filed a short form registration statement, terminated their connection with any foreign principal during this 6 month reporting period? Yes ☐ No ☒

If yes, furnish the following information:

Name	Position or Connection	Foreign Principal	Date Terminated

6. Have short form registration statements been filed by all of the persons named in Items 5(a) and 5(b) of the supplemental statement?

Yes ☐ No ☐

If no, list names of persons who have not filed the required statement.

This question is not applicable as our answers to Items 5(a) and 5(b) were No.

II - FOREIGN PRINCIPAL

7. Has your connection with any foreign principal ended during this 6 month reporting period? Yes ☐ No ☒
If yes, furnish the following information:

Foreign Principal | Date of Termination

8. Have you acquired any new foreign principal(s)[2] during this 6 month reporting period? Yes ☐ No ☒
If yes, furnish th following information:

Name and Address of Foreign Principal(s) | Date Acquired

9. In addition to those named in Items 7 and 8, if any, list foreign principal(s)[2] whom you continued to represent during the 6 month reporting period.

States of Jersey
State of Guernsey
Hashemite Kingdom of Jordan, Embassy
Arab Bank PLC
Deutsche Bahn AG
Government of the Republic of Singapore

10. (a) Have you filed exhibits for the newly acquired foreign principal(s), if any, listed in Item 8?

Exhibit A[3] Yes ☐ No ☐
Exhibit B[4] Yes ☐ No ☐

If no, please attach the required exhibit.

(b) Have there been any changes in the Exhibits A and B previously filed for any foreign principal whom you represented during this six month period? Yes ☐ No ☒
If yes, have you filed an amendment to these exhibits? Yes ☐ No ☐

If no, please attach the required amendment.

2 The term "foreign principal" includes, in addition to those defined in section 1(b) of the Act, an individual organization any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign government, foreign political party, foreign organization or foreign individual. (See Rule 100(a) (9)). A registrant who represents more than one foreign principal is required to list in the statements he files under the Act only those principals for whom he is not entitled to claim exemption under Section 3 of the Act. (See Rule 208.)

3 The Exhibit A, which is filed on Form NSD-3 (Formerly CRM-157) sets forth the information required to be disclosed concerning each foreign principal.

4 The Exhibit B, which is filed on Form NSD-4 (Formerly CRM-155) sets fourth the information concerning the agreement or understanding between the registrant and the foreign principal.

III - ACTIVITIES

11. During this 6 month reporting period, have you engaged in any activities for or rendered any services to any foreign principal named in Items 7, 8, or 9 of this statement? Yes ☒ No ☐

If yes, identify each foreign principal and describe in full detail your activities and services:

SEE ATTACHED PAGE

12. During this 6 month reporting period, have you on behalf of any foreign principal engaged in political activity[5] as defined below? Yes ☒ No ☐

If yes, identify each such foreign principal and describe in full detail all such political activity, indicating, among other things, the relations, interests and policies sought to be influenced and the means employed to achieve this purpose. If the registrant arranged, sponsored or delivered speeches, lectures or radio and TV broadcasts, give details as to dates, places of delivery, names of speakers and subject matter.

SEE ATTACHED PAGE

13. In addition to the above described activities, if any, have you engaged in activity on your own behalf which benefits your foreign principal(s)? Yes ☐ No ☒

If yes, describe fully.

5 The term "political activity" means any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting or changing the domestic or foreign policies of the United States or with reference to political or public interests, policies, or relations of a government of a foreign country or a foreign political party.

IV - FINANCIAL INFORMATION

14. (a) **RECEIPTS-MONIES**

During this 6 month reporting period, have you received from any foreign principal named in Items 7, 8, or 9 of this statement, or from any other source, for or in the interests of any such foreign principal, any contributions, income or money either as compensation or otherwise? Yes ☒ No ☐

If no, explain why.

If yes, set forth below in the required detail and separately for each foreign principal an account of such monies.[6]

Date	From Whom	Purpose	Amount
SEE ATTACHED EXHIBIT			

Total

(b) **RECEIPTS - FUNDRAISING CAMPAIGN**

During this 6 month reporting period, have you received, as part of a fundraising campaign[7], any money on behalf of any foreign principal named in Items 7, 8, or 9 of this statement? Yes ☐ No ☒

If yes, have you filed an Exhibit D to your registration? Yes ☐ No ☐

If yes, indicate the date the Exhibit D was filed. Date _____

(c) **RECEIPTS-THINGS OF VALUE**

During this 6 month reporting period, have you received any thing of value[9] other than money from any foreign principal named in Items 7, 8, or 9 of this statement, or from any other source, for or in the interests of any such foreign principal?

Yes ☐ No ☒

If yes, furnish the following information:

Foreign Principal	Date Received	Thing of Value	Purpose

6, 7 A registrant is required to file an Exhibit D if he collects or receives contributions, loans, moneys, or other things of value for a foreign principal, as part of a fundraising campaign. (See Rule 201(e)).

8 An Exhibit D, for which no printed form is provided, sets forth an account of money collected or received as a result of a fundraising campaign and transmitted for a foreign principal.

9 Things of value include but are not limited to gifts, interest free loans, expense free travel, favored stock purchases, exclusive rights, favored treatment over competitors, "kickbacks," and the like.

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15. (a) **DISBURSEMENTS-MONIES**

During this 6 month reporting period, have you

(1) disbursed or expended monies in connection with activity on behalf of any foreign principal named in Items 7, 8, or 9 of this statement? Yes ☒ No ☐

(2) transmitted monies to any such foreign principal? Yes ☐ No ☒

If no, explain in full detail why there were no disbursements made on behalf of any foreign principal.

If yes, set forth below in the required detail and separately for each foreign principal an account of such monies, including monies transmitted, if any, to each foreign principal.

Date	To Whom	Purpose	Amount
SEE ATTACHED EXHIBIT			

Total

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(b) **DISBURSEMENTS-THINGS OF VALUE**

During this 6 month reporting period, have you disposed of anything of value[10] other than money in furtherance of or in connection with activities on behalf of any foreign principal named in Items 7, 8, or 9 of this statement?

Yes ☐ No ☒

If yes, furnish the following information:

Date	Recipient	Foreign Principal	Thing of Value	Purpose

(c) **DISBURSEMENTS-POLITICAL CONTRIBUTIONS**

During this 6 month reporting period, have you from your own funds and on your own behalf either directly or through any other person, made any contributions of money or other things of value[11] in connection with an election to any political office, or in connection with any primary election, convention, or caucus held to select candidates for political office?

Yes ☐ No ☒

If yes, furnish the following information:

Date	Amount or Thing of Value	Political Organization or Candidate	Location of Event

10, 11 Things of value include but are not limited to gifts, interest free loans, expense free travel, favored stock purchases, exclusive rights, favored treatment over competitors, "kickbacks" and the like.

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V - INFORMATIONAL MATERIALS

16. (a) During this 6 month reporting period, did you prepare, disseminate or cause to be disseminated any informational materials?[12]
Yes ☒ No ☐

If Yes, go to Item 17.

(b) If you answered No to Item 16(a), do you disseminate any material in connection with your registration?
Yes ☐ No ☐

If Yes, please forward the materials disseminated during the six month period to the Registration Unit for review.

17. Identify each such foreign principal.
Deutsche Bahn AG

18. During this 6 month reporting period, has any foreign principal established a budget or allocated a specified sum of money to finance your activities in preparing or disseminating informational materials? Yes ☐ No ☒

If yes, identify each such foreign principal, specify amount, and indicate for what period of time.

19. During this 6 month reporting period, did your activities in preparing, disseminating or causing the dissemination of informational materials include the use of any of the following:

☐ Radio or TV broadcasts ☐ Magazine or newspaper ☐ Motion picture films ☒ Letters or telegrams
☐ Advertising campaigns ☐ Press releases ☒ Pamphlets or other publications ☐ Lectures or speeches
☐ Other *(specify)* _____

Electronic Communications

☒ Email
☐ Website URL(s): _____
☐ Social media websites URL(s): _____
☐ Other *(specify)* _____

20. During this 6 month reporting period, did you disseminate or cause to be disseminated informational materials among any of the following groups:

☒ Public officials ☐ Newspapers ☐ Libraries
☒ Legislators ☐ Editors ☐ Educational institutions
☒ Government agencies ☐ Civic groups or associations ☐ Nationality groups
☐ Other *(specify)* _____

21. What language was used in the informational materials:

☒ English ☐ Other *(specify)* _____

22. Did you file with the Registration Unit, U.S. Department of Justice a copy of each item of such informational materials disseminated or caused to be disseminated during this 6 month reporting period? Yes ☒ No ☐

23. Did you label each item of such informational materials with the statement required by Section 4(b) of the Act?
Yes ☒ No ☐

12 The term informational materials includes any oral, visual, graphic, written, or pictorial information or matter of any kind, including that published by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or any means or instrumentality of interstate or foreign commerce or otherwise. Informational materials disseminated by an agent of a foreign principal as part of an activity in itself exempt from registration, or an activity which by itself would not require registration, need not be filed pursuant to Section 4(b) of the Act.

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VI - EXECUTION

In accordance with 28 U.S.C. § 1746, the undersigned swear(s) or affirm(s) under penalty of perjury that he/she has (they have) read the information set forth in this registration statement and the attached exhibits and that he/she is (they are) familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his/her (their) knowledge and belief, except that the undersigned make(s) no representation as to truth or accuracy of the information contained in the attached Short Form Registration Statement(s), if any, insofar as such information is not within his/her (their) personal knowledge.

(Date of signature)	(Print or type name under each signature or provide electronic signature[13])
_____	_____
_____	_____
_____	_____
_____	_____

13 This statement shall be signed by the individual agent, if the registrant is an individual, or by a majority of those partners, officers, directors or persons performing similar functions, if the registrant is an organization, except that the organization can, by power of attorney, authorize one or more individuals to execute this statement on its behalf.

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Item 4

NAME	ADDRESS	CHANGE DATE
Ahmed, Shibeer	C/O White & Case LLP 16th Floor Al SilaTower Abu Dhabi, United Arab Emirates	06/18/12
Ahmedani, Zeeshan	C/O White & Case LLP 16th Floor Al Sila Tower Abu Dhabi, United Arab Emirates	06/18/12
Aragon, Rudolph	4867 S.W. 82nd Street Miami, FL 33143 United States	04/17/12
Arndt, Jan-Holger	Marienburger Strasse 64 Koln, NK 50968 Germany	07/03/12
Arora, Monica	39 Lispenard Street, Apt. 4A New York, NY 10013 United States	09/18/12
Arriola Penalosa, Iker Ignacio	Paseo de los Laureles 377 Casa 33 Bosques de las Lomas Mexico City D.F., 05120 Mexico	04/30/12
Artzinger-Bolten, Jochen	Thorwaldsenstrasse 35 Frankfurt Am Main, 60596 Germany	06/11/12
Asner, Karen	12 West 96th Street Apt. 2A New York, NY 10025 United States	05/09/12
Ballard, Ashley	Linksmere Water Lane Surrey, GU8 5 England	04/24/12
Becker, David	One Warrington Gardens London, W9 2Q United Kingdom	04/02/12
Bondoc, Lucian	Ion Tuculescu 33 G10 Flat No. 8 Bucharest, unkno Romania	05/03/12

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NAME	ADDRESS	CHANGE DATE
Boylan, Kim Marie	2809 34th Place N.W. Washington, DC 20007 United States	04/17/12
Butler, Melissa	5 Lavender Grove London, E8 3L United Kingdom	09/07/12
Byrne, Darragh	Bardabacken 15 Stockholm, 16771 Sweden	09/10/12
Cakmak, Mesut	Angora Evleri Camlica Cad. No. 10 Beysukent Ankara, NK Turkey	05/30/12
Capper, Phillip	Flat 601 City Pavilion 33 Britton Street London, EC1M5 United Kingdom	07/25/12
Cerasani, Denise	15 West 75th Street, Apt. 9A New York, NY 10023 United States	05/08/12
Chernichaw, Adam	33 Greenwich Avenue Apt.4M New York, NY 10014 United States	06/07/12
Chung, Robert	8100 River Road Unit 501 North Bergen, NJ 07047 United States	05/08/12
Clark, Jonathan	Dunsfold Grange The Green Dunsfold Surrey, NK GU8 4 United Kingdom	08/03/12
Clinton, William	10562 Josaih Adams Place Delaphane, VA 20144 United States	09/06/12
Cole, Margaret	C/O White & Case LLP 16th Floor Al Sila Tower Abu Dhabi, United Arab Emirates	06/18/12

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NAME	ADDRESS	CHANGE DATE
Corta-Fernandez, Vicente	Fuego 989 Col. Jardines Del Pedregal D.F., 01900 Mexico	04/17/12
Cunningham, John	29 Tonsley Hill London, SW18 United Kingdom	06/06/12
Currier, G. William	1318 Rhode Island Avenue N.W. Washington, DC 20005 United States	04/17/12
Daniel, Saul	C/O White & Case LLP 16th Floor Al Sila Tower Abu Dhabi, United Arab Emirates	06/18/12
De Vita, Franck	8 Rue Catulle Mendes Paris, 75017 France	04/17/12
DeSantis, Victor	9605 Eagle Ridge Drive Bethesda, MD 20817 United States	09/06/12
Diallo, Denise	51 Rue Erlanger Paris, 75016 France	05/30/12
Edwards-Frampton, Christopher	435 E. 79th Street Apt. 9B New York, NY 10075 United States	05/08/12
Ellis, Kenneth	C/O White & Case LLP 200 South Biscayne Boulevard Miami, FL 33131 United States	07/23/12
Erb, Nicole	4801 Dover Court Bethesda, MD 20816 United States	07/02/12
Etienne-Cummings, Shamita	1520 Kingman Place N.W. Washington, DC 20005 United States	09/06/12
Finlay, Peter	53 Egerton Crescent London, SW3 2 United Kingdom	07/02/12

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NAME	ADDRESS	CHANGE DATE
Forrester, Ian	73 Square Marie Louise Brussels, 1000 Belgium	04/17/12
Gong, Chang-Do	51 Northwood Avenue Demarest, NJ 07627 United States	05/10/12
Grosse Honebrink, Josef	Joseph-Haydn-Strasse 21 Kelkheim, 65779 Germany	04/20/12
Hamilton, Jonathan	3426 Prospect Street N.W. Washington, DC 20007 United States	08/08/12
Hawkes, Kenneth	1003 Bukit Timah Road #03-08 Tower B Singapore, 59628 Singapore	04/20/12
Heuchemer, Frank	Richard-Wagner-Strasse 5 Frankfurt Am Main, 60318 Germany	04/17/12
Higham, John	27 Southwood Avenue Highgate London, N6 5S United Kingdom	06/14/12
Immordino, Michael	69 Palace Court London, NK W24JB United Kingdom	07/12/12
Johnson, Sean	C/O White & Case LLP 16th Floor, Al Sila Tower Abu Dhabi, United Arab Emirates	06/18/12
Klengel, Jurgen Detlef	Kaiser-Friedrich-Promenade 153B Bad Homburg, 61352 Germany	08/22/12
Kreppel, Ulf	Prinzeregentenstrasse 74 Munich, 81675 Germany	08/23/12
Lan, Tao	Room 1702 Entrance 1 Building 8 Jin Du Hang Cheng Beijing, 10000 China	08/07/12

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NAME	ADDRESS	CHANGE DATE
Laplante, Eric	Route De Roches 19 Cresuz, 1653 Switzerland	07/05/12
Lauria, Thomas	200 S. Biscayne Boulevard Suite 4900 Miami, FL 33131 United States	05/16/12
Lee, James	3644 Woodcliff Road Sherman Oaks, CA 91403 United States	04/16/12
Leicht, Eric	46 Willow Street Brooklyn, NY 11201 United States	07/16/12
Lightfoot, Charles	19d Primrose Gardens London, NW3 4 United Kingdom	04/20/12
Luchs, Bryan	11 Penrose Lane Princeton Junction, NJ 08550 United States	05/08/12
Matejcek, Jan	57 Allitsen Road St. John's Wood London, NW8 7 Czech Republic	08/07/12
McAliley, Thomas	3941 Midway Street Miami, FL 33133 United States	04/26/12
McDonald, Thomas	6 Bruysov Pereulok Apt. 46 Moscow, 12500 Russia	04/02/12
McDougall, Andrew	White & Case LLP 19 Place Vendome Paris, 75001 France	04/17/12
Morin, Vincent	2 Sq Charles Laurent Paris, 75015 France	04/18/12
Morioka, Leslie	7 Nuvern Avenue Mt. Vernon, NY 10550 United States	05/30/12

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NAME	ADDRESS	CHANGE DATE
Nairac, Charles	74 Rue De Paris Meudon, 92190 France	07/25/12
Ng, Kevin	12 Admirals Gate Greenwich London, SE10 United Kingdom	08/08/12
Olofsson, Rolf	1230 Twenty Third Street Apt. 505 Washington, DC 20037 United States	06/11/12
Orozco Waters, Rodrigo	Calderon de la Barca No. 15 Mexico City, 11000 Mexico	05/24/12
Owens, Gregory	3657 Broadway Apt. 10H New York, NY 10031 United States	05/08/12
Parbhu, Joshua	102 Abbeville Road London, SW4 9 United Kingdom	08/07/12
Patrikis, Ernest	20 East 9th Street Apt. 18C New York, NY 10003 United States	05/02/12
Payne, Stephen	2-193 C Area Yosemite No. 4 Yuyang Road Hou Sha Yu Town Shunyi District Beijing, 10130 China	05/03/12
Peel, Douglas	C/O White & Case LLP 16th Floor C1 Tower Six Tower Complex Abu Dhabi, United Arab Emirates	05/25/12
Pierce, Morton	125 East 72nd Street New York, NY 10019 United States	05/10/12
Polonsky, Marc	Springfield 443 Cherry Hinton Road Cambridge, CB18D United Kingdom	06/26/12

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NAME	ADDRESS	CHANGE DATE
Power, Philip	C/O White & Case LLP 16th Floor C1 Tower Six Tower Complex Abu Dhabi, 10801 United Arab Emirates	04/03/12
Raney, Steven	45 Avonwold Road Saxonwold Johannesburg, 2196 South Africa	05/03/12
Robinson, James	13783 Southwest 31st Street Miramar, FL 33027 United States	05/03/12
Rutta, Michelle	9 Hickory Drive Great Neck, NY 11021 United States	05/08/12
Sabharwal, Dipen	Flat 4 57 Compayne Gardens London, NW6 3 United Kingdom	09/10/12
Schorling, Tom Oliver	Dettweilerstrasse 15 Kronberg, 61476 Germany	05/03/12
Secomb, Matthew	1 Rue Pasteur Saint Cloud, 92210 France	08/08/12
Smarsh, Brian	310 West 52nd Street, Apt. 11H New York, NY 10019 United States	05/08/12
Starner, Gregory	99 Gold Street Apt. PH A New York, NY 11201 United States	08/07/12
Steedman, Campbell	White & Case LLP 16th Floor Al Sila Tower Abu Dhabi, United Arab Emirates	06/18/12
Stilcken, Andreas	Wilhelm-Beer-Weg 65 Frankfurt Am Main, 60599 Germany	07/19/12

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NAME	ADDRESS	CHANGE DATE
Tivey, John	100 Clemence Ave North #11-105 Cavenagh House Singapore, 22949 Singapore	07/06/12
Turrini, Michael	C/O White & Case LLP 16th Floor Al Sila Tower Abu Dhabi, United Arab Emirates	06/18/12
Utting, Christopher	23 Farm Avenue London, NW22B United Kingdom	05/03/12
Vasquez, Francis	2109 Arrowleaf Drive Vienna, VA 22182 United States	07/02/12
Vetterli, John	Rua Araporé, 817 Jd. Guedala Sau Paulo, 05608 Brazil	08/30/12
Vikstrom, Rikard	Ostermalmsgatan 61 Stockholm, 11450 Sweden	04/03/12
Wall, Barrye	C/O White & Case LLP 1155 Avenue of the Americas New York, NY 10036 United States	04/30/12
Webber, Jason	2179 Bulls Head Road Stanfordville, NY 12581 United States	08/22/12
Weber, Robert	Zeppelinstrasse 46 Neu- Isenburg, 63263 Germany	08/27/12
Wecker, Claus	Neusser Tor 17A Dusseldorf, 40625 Germany	04/04/12
Weir, Gavin	403 Fulham Road London, SW10 United Kingdom	05/22/12

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NAME	ADDRESS	CHANGE DATE
Zhang, Zhao	#205 Lakeside Ville Huqingping Road 1517 Long Shanghai, 20170 China	05/03/12
de la Garza, Jorge	Batallon de San Patricio 111-28 Colonia Valle Oriente San Pedro Garza Garc, 66269 Mexico	06/11/12

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Item 4(b)

WHITE & CASE LLP
NEW PARTNERS
April 1, 2012 - Septebmer 30, 2012

NAME	PARTNERSHIP DATE	CITIZENSHIP	RESIDENCE ADDRESS
Arndt, Jan-Holger	06/01/12	Germany	Marienburger Strasse 64 Koln,NK 50968 Germany
Byrne, Darragh P.	09/10/12	Ireland	Bardabacken 15 Stockholm,16771 Sweden
Cerasani, Denise A.	05/07/12	United States	15 West 75th Street, Apt. 9A New York,NY 10023 United States
Chung, Robert N.	05/07/12	United States	8100 River Road Unit 501 North Bergen,NJ 07047 United States
Gong, Chang-Do	05/07/12	Not Known	51 Northwood Avenue Demarest,NJ 07627 United States
Hwang, Eric	09/25/12	United States	108 Loucks Avenue Los Altos,CA 94022 United States
Lan, Tao	07/02/12	China	Room 1702 Entrance 1 Building 8 Jin Du Hang Cheng Baiziwan Road Chaoyang District Beijing,100000 China
Luchs, Bryan J.	05/07/12	United States	11 Penrose Lane Princeton Junction,NJ 08550 United States
Owens, Gregory M.	05/07/12	United States	3657 Broadway Apt. 10H New York,NY 10031 United States

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WHITE & CASE LLP
NEW PARTNERS
April 1, 2012 - Septebmer 30, 2012

NAME	PARTNERSHIP DATE	CITIZENSHIP	RESIDENCE ADDRESS
Pierce, Morton A.	05/03/12	United States	125 East 72nd Street New York,NY 10019 United States
Rose, Christopher	09/25/12	United States	1050 Crestview Drive Apt. 49 Mountain View,CA 94040 United States
Rutta, Michelle B.	05/07/12	United States	9 Hickory Drive Great Neck,NY 11021 United States
Smarsh, Brian M.	05/07/12	United States	310 West 52nd Street, Apt. 11H New York,NY 10019 United States
Tivey, John R	05/28/12	Australia	100 Clemence Ave North #11-105 Cavenagh House Singapore,229491 Singapore

Total New Partners: 14

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Item 4(a)

10/09/12;13:19

WHITE & CASE LLP
PARTNER DEPARTURES
April 1, 2012 - September 30, 2012

REGION	LOCATION	NAME	DEPATURE DATE
CEE	Warsaw	Danilowicz, Witold	08/31/12
CEE	Prague	Dlouhy, Michal	05/31/12
CEE	Moscow	Krogius, Sven	09/28/12
CEE	Moscow	Nesvetova, Irina N.	08/03/12
Germany	Hamburg	Kecker, Jan-Peter	09/28/12
Germany	Berlin	Pochhammer, Andreas	05/31/12
Latin America	Mexico	Bernal-Caso, Eugenio	05/25/12
Latin America	Mexico	Libenson Violan, Ivan	05/25/12
Latin America	Mexico	Rico Caso, Juan P.	05/25/12
Latin America	Monterrey	Sepulveda Gonza, Eugenio	05/31/12
US	Miami	Alvarez, Pedro A.	07/16/12
US	New York	Hollander, Evan C.	07/17/12
US	New York	Pinkusiewicz, Tomer	05/11/12
US	New York	Rutherfurd, Winthrop	09/01/12
US	New York	Teichman, Steven J.	07/15/12
US	New York	Uzzi, Gerard H.	07/25/12
US	Los Angeles	Woods, Daniel J.	05/31/12
WEMEA	Stockholm	Boman, Mats	08/31/12
WEMEA	Paris	Bouvet, Frederic	05/15/12
WEMEA	Stockholm	Lombach, Jan	04/13/12
WEMEA	Stockholm	Sundberg, Anna S.	05/31/12
WEMEA	London	Trinder, Jeremy	06/11/12
WEMEA	London	Winsor, Tom	09/28/12

Total Partner Departures: 23

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Item 11

During this 6 month reporting period, have you engaged in any activities for or rendered any services to any foreign principal named in Items 7, 8, and 9 of this statement?

States of Jersey	-General legal representation
States of Guernsey	-General legal representation
Government Of The Republic Of Singapore	-General legal representation
Arab Bank PLC	-The Registrant has provided legal services in connection with pending or threatened U.S. litigation against the foreign principal. These legal services have included communications with U.S. government officials related to U.S. litigation and civil enforcement matters. The Registrant has also advised the foreign principal regarding public relations issues related to U.S. litigation matters.
Kingdom of Jordan	-The Registrant has provided legal services in connection with pending or threatened U.S. litigation against the foreign principal. These legal services have included communications with U.S. government officials related to U.S. litigation and civil enforcement matters. The Registrant has also advised the foreign principal regarding public relations issues related to U.S. litigation matters.
Deutsche Bahn AG	-The Registrant has provided legal services in connection with pending or threatened U.S. litigation against the foreign principal. These legal services have included communications with U.S. government officials related to U.S. litigation and civil enforcement matters. The Registrant has also advised the foreign principal regarding public relations issues related to U.S. litigation matters.

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Item 12

Deutsche Bahn AG
Schedule of Contacts with U.S. Government Officials involving Political Activities

Date of Contact	Name & Title of U.S. Government Official Contacted	Manner in which Contact made	Description of Subject Matter Discussed
1/20/2012	Orly Isaacson Legislative Director for Rep. Carolyn Maloney	Email	Memos relating to pending legislation
	Stephanie Martz Chief Counsel to Senate Judiciary Committee	Email	Memos relating to pending legislation
	Marin Stein Legislative Assistant to Senator Bill Nelson	Email	Memos relating to pending legislation
	Erika Schlager Counsel for International Law for the U.S. Commission on Security and Cooperation In Europe	Email	Memos relating to pending legislation
	Fred Turner Deputy Chief of Staff for the U.S. Commission on Security and Cooperation in Europe	Email	Memos relating to pending legislation
	Yleem Poblete Chief of Staff to House Committee	Email	Memos relating to pending legislation

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Deutsche Bahn AG
Schedule of Contacts with U.S. Government Officials involving Political Activities

Date of Contact	Name & Title of U.S. Government Official Contacted	Manner in which Contact made	Description of Subject Matter Discussed
	on Foreign Affairs		
	Gabriella Ra'anan Junior Professional Staff Member for Holocaust Issues) to House Committee on Foreign Affairs	Email	Memos relating to pending legislation
	John Amaya Senior Counsel to Senate Committee on the Judiciary	Email	Memos relating to pending legislation
2/17/2012	Douglas Davidson Special Emvoy for Holocaust Issues, U. S. Dept. of State	Email	Memos relating to pending legislation
5/16/2012	Douglas Davidson Special Envoy for Holocaust Issues, U.S. Dept. of State	Email	Memo relating to pending legislation and book chapter reprint
5/29/2012	Orly Isaacson Legislative Director for Rep. Carolyn Maloney	Letter	Memo relating to recent ICJ decision
	Stephanie Martz Chief Counsel to Senate Judiciary	Letter	Memo relating to recent ICJ decision

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Item 12

Deutsche Bahn AG
Schedule of Contacts with U.S. Government Officials involving Political Activities

Date of Contact	Name & Title of U.S. Government Official Contacted	Manner in which Contact made	Description of Subject Matter Discussed
	Committee		
	John Amaya Senior Counsel to Senate Committee on the Judiciary	Letter	Memo relating to recent ICJ decision
	Eric Haren Counsel to Sen. Diane Feinstein	Letter	Memo relating to recent ICJ decision and memo relating to pending legislation
	Ralph Johnson Counsel to Senator Chuck Grassley	Letter	Memo relating to recent ICJ decision and memo relating to pending legislation
	Jeremy Bratt Legislative Director to Sen. Richard Blumenthal	Letter	Memo relating to recent ICJ decision and memo relating to pending legislation
	Greg Tinch CBCF Legal Fellow to Sen. Richard Blumenthal	Letter	Memo relating to recent ICJ decision and memo relating to pending legislation
	Douglas Davidson Special Envoy for Holocaust Issues U.S. Department of State	Email	Memo relating to recent ICJ decision
6/8/2012	Stephanie Martz Chief Counsel to Senate Judiciary Committee	Email	Memo relating to pending legislation and book chapter reprint

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Item 12

Deutsche Bahn AG
Schedule of Contacts with U.S. Government Officials involving Political Activities

Date of Contact	Name & Title of U.S. Government Official Contacted	Manner in which Contact made	Description of Subject Matter Discussed
	Erika Schalger Counsel for International Law for the U.S. Commission on Security and Cooperation in Europe	Email	Memo relating to pending legislation and book chapter reprint
	Eric Haren Counsel to Sen. Diane Feinstein	Email	Memo relating to pending legislation and book chapter reprint
6/15/2012	Stephanie Martz Chief Counsel to Senate Judiciary Committee	Email	Copy of US Government Supplemental Amicus Brief in Kiobel v. Royal Dutch Shell Petroleum Corp.
	John Amaya Senior Counsel to Senate Committee on the Judiciary	Email	Copy of US Government Supplemental Brief in Kiobel v. Royal Dutch Shell Petroleum Corp.
	Eric Haren Counsel to Senator Diane Feinstein	Email	Copy of US Government Supplemental Brief in Kiobel v. Royal Dutch Shell Petroleum Corp.
	Ralph Johnson Counsel to Sen. Chuck Grassley	Email	Copy of US Government Supplemental Brief in Kiobel v. Royal Dutch Shell Petroleum Corp.
	Douglas Davidson Special Envoy for Holocaust Issues U.S. Dept. of State	Email	Copy of US Government Supplemental Brief in Kiobel v. Royal Dutcyh Shell Petroleum Corp.

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Item 14

Foreign Agent Registration Act
Fees/Costs Received
Period: October 1, 2011 - March 31, 2012

CLIENT NUMBER	CLIENT NAME	DATE	FEES RECEIVED	DISBURSEMENTS RECEIVED	TOTAL
110185	Arab Bank	5/31/2012	757,895.00	73691	831,586.00
			757,895.00	**73,691.00**	**831,586.00**
1107804	Deutsche Bahn AG	5/8/2012	11,898.00	0.00	11,898.00
		8/17/2012	9,734.00	2,131.00	11,865.00
			21,632.00	**2,131.00**	**23,763.00**
4218554	States of Guernsey		0.00	0.00	0.00
4221797	Isle of Mann		0.00	0.00	0.00
4222162	States of Jersey		0.00	0.00	0.00
1281719	Govt. of the Republic of Singapore		0.00	0.00	0.00
	TOTAL USD		**779,527.00**	**75,822.00**	**855,349.00**

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Item 15(a)

Foreign Agents Registration Act

Client Name	Date	Disbursements received	Purpose	Date of Travel	Traveller Name	Destination	Purpose of Travel
States of Guernsey		$0					
States of Jersey		$0					
Kingdom of Jordan		$0					
Arab Bank plc	5/31/12	$18,742	Airfare	4/21/2012	A. Gover	London	Meeting with Client
	5/31/12	$21,732	Office Expense				
	6/29/12	$14,788	Office Expense				
	8/28/12	$18,249	Office Expense				
Deutsche Bahn AG	8/17/12	$2,131	Office Expense				
Govt. of the Republic of Singapore	5/15/12	$95	Office Expense				

Note -

1. Office expenses include: binding, fax, filing fees, photocopy, postage, local taxi, telephone, computer legal research, and secretarial services

2. There were no US Government officials or media representatives for whom travel or entertainment expenses were incurred or were guests of the Registrant.

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SECTION V – INFORMATIONAL MATERIALS

Copy of materials disseminated by the Registrant on behalf of Deutsche Bahn AG To Treasury, State Department and Congressional Committees on the tax and financial system of the State of Jersey via US mails as indicated in item 12.

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Holocaust and Justice

Representation and Historiography of the Holocaust in Post-War Trials

Edited by
David Bankier and Dan Michman

Jerusalem 2010

Yad Vashem
Jerusalem

Berghahn Books
NEW YORK • OXFORD

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The Case of the French Railways and the Deportation of Jews in 1944

MICHAEL R. MARRUS

How well does the law address the history and memory of the Holocaust, and what happens when the quest for justice, by seeking to rectify wrongs done to the Jews, departs from a balanced sense of responsibility and judgment? This article looks at one specific instance — the June 2006 decision of the Administrative Court of the city of Toulouse — which puts these questions into sharp relief and highlights some of the limits of the legal encounter with the murder of European Jews.[1] Before the court was a tale very familiar to students of the Holocaust: the deportation of Jews, in this case from France. To the surprise of many at the time, the Toulouse court pronounced against the two defendants, the French state and the French National Railways (Société Nationale des Chemins de fer Français or SNCF), accused of administrative wrongdoing regarding a transport that took place more than sixty years ago. As controversy over this judgment widened, reactions fell into two camps.

1 The judgment of the Toulouse court may be found linked to the Web site of the plaintiff's attorney, Rémi Rouquette. See http://www.acaccia.fr/. For the judgment, see http://www.acaccia.fr/IMG/pdf/jugement.pdf, and for an English translation see http://www.acaccia.fr/-Translation-in-English-.html, last retrieved January 12, 2006. My citations will be to the latter, whose full title is *The Administrative Court of Toulouse, Case No. 0101248, Mr. A. and the similarly situated Lipietz plaintiffs v. the Prefect of Haute-Garonne and the Société nationale des chemins de fer* (French National Railway Company, hereinafter "SNCF"), hereinafter, "Judgement," June 6, 2006.

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For some, the court's finding was not only a welcome gesture of reparation to the plaintiffs, the late Georges Lipietz and members of his family, but another step in a decades-long struggle to seek justice for crimes against the Jews. For others, the judgment was "absurd," an abuse of the legal process, distorting responsibility for the Holocaust.[2] At first glance it appears that the reactions were extreme — overblown, given what one might expect from a decision made by a relatively modest administrative tribunal, issuing from a provincial city mainly associated with the stirring 1942 protests on the Jews' behalf by its wartime Archbishop Jules-Gérard Saliège.[3] But I think not. I will explain why there was much at stake in the Toulouse judgment, place it into context, and probe some wider implications in the quest for historical justice for the wrongs done to Jews during the course of the Holocaust.

But first some background: Of the approximately 330,000 Jews living in France at the time of the German invasion of 1940, nearly 77,000 were deported to Nazi camps, mainly Auschwitz, in just over eighty railway convoys, all but one of which involved sealed freight cars and inhuman conditions as the trains traveled across Europe. Of the deportees, only about 2500 returned.[4] We know of these numbers from many sources, all of them associated with the German occupation of wartime France, but available since 1978 in a remarkable volume, the *Mémorial de la déportation des Juifs de France*, published by Nazi-hunter and activist lawyer Serge Klarsfeld. The *Mémorial* is a telephone book-sized volume, painstakingly researched, that lists the names of each

2 See Marc Pivois, "Une condamnation qui suscite peu d'adhésion", *Libération*, June 7, 2006; Antoine de Baecque, "Un rouage essentiel de la machine de mort," *Libération*, June 7, 2006. See also Annette Wieviorka, "L'État et la SNCF condamnés," *Le Monde*, June 9, 2006, and a reply by Hélène et Alain Lipietz, "Condamnation pour mémoire," *Le Monde*, June 14, 2006. For a report on reactions see Anne-Charlotte De Langhe, "Déportation: les historiens défendent la SNCF," *Le Figaro*, September 1, 2006, and for the reaction of the director general of the SNCF see Louis Gallois, "La SNCF n'est pas responsable de la déportation des Juifs," *Le Figaro*, August 28, 2006.

3 See Michael R. Marrus and Robert O. Paxton, *Vichy France and the Jews* (New York: Basic Books, 1982), p. 271.

4 Serge Klarsfeld, *Le Mémorial de la déportation des Juifs de France* (Paris: Beate & Serge Klarsfeld, 1978). See Michael R. Marrus and Robert O. Paxton, *Vichy France and the Jews* (New York; Basic Books, 1981), p. 343.

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and every individual trapped in the convoys on their tragic journey to Auschwitz and in a few cases to other murder facilities.

Of the deportees, close to half came from the Paris region and the rest from the provinces. Those from the provinces were dispatched by French and German police from various assembly points across France to the holding camp of Drancy, in a dreary suburb northeast of Paris, from which they were later dispatched "to the east," as it was called at the time. The story at issue in the French railways case has to do with one of those convoys.

Regarding the responsibility for the deportation convoys, in addition to the SNCF the Administrative Court of Toulouse also pronounced on the role of the French state, specifically its local representative, the prefect of the department of the Haute-Garonne. But it is the role of the SNCF that gained public attention, and for good reason. Formed in 1938 as a result of the nationalization of France's five major railways, the SNCF was a public enterprise, under government control, with just over half of its stock owned by the state and the rest by the formerly independent companies.[5] From the standpoint of the efforts to rectify historic wrongs, what is so unusual in this case is not that the French government was found liable for wartime events. However one assesses this particular judgment and its specific findings of liability, of Vichy's active participation in the persecution and deportation of Jews in France has long since passed into the professional historical canon and is widely accepted. Moreover, the French state's responsibility for the crimes of the Vichy government has been fully accepted since the mid-1990s, particularly since the outcome of the trial of Maurice Papon in 1998.[6] What is unusual, rather, is the focus upon the independent liability of a specific government agency, the French national railway, which by virtue of this decision was then globally stigmatized, in the unvarnished phraseology of the otherwise sober *Christian Science Monitor*, to take just one example, as a "Nazi collaborator."[7] Not since the International

5 "Historique des Chemins de Fer en France," http://perso.orange.fr/rubio.eric/historisncf.htm, retrieved January 11, 2007.

6 See Richard J. Goslan, *The Papon Affair: Memory and Justice on Trial* (New York: Routledge, 2000).

7 "France tags a Nazi collaborator: the railway," *Christian Science Monitor*, June 16, 2006.

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Military Tribunal at Nuremberg, to my knowledge, where a concerted effort was made to identify organizational responsibility as well as that of individuals accused of war crimes and crimes against humanity, has an organization been singled out in this way through a court decision. It is particularly ironic that this agency was not a more commonly identified perpetrator such as, for example, the French police — the agency that oversaw much of the persecution of Jews in their day-to-day lives, rounded them up, and guarded them in freight cars until they reached the German frontier when the Germans took over the task.[8] That the inculpated organization in this case was a popular French utility — seen as "democratic," as compared to the airlines; publicly owned and perhaps because of its powerful trade unions vaguely identified with the left; and for the most part efficient, distinguishing it from many other public services in France — makes the decision even more noteworthy and probably conditions reactions of the French.

Here are some facts of the case: On the morning of May 8, 1944, almost a month before the D-Day landings in Normandy and the beginning of the liberation of France, twenty-one year old Georges Lipietz and his brother Guy, together with his mother and stepfather, were arrested by the Gestapo in the town of Pau in the French Pyrenees, probably as a result of a denunciation. The Germans turned their Jewish charges over to the French police, who dispatched them to nearby Toulouse.[9] A day or so later, together with other Jewish arrestees, Lipietz and his relatives were put in a deportation convoy to the Gare d'Austerliz in Paris. The conditions of the transport to Paris were horrendous. Georges Lipietz remembered a voyage of thirty hours in a freight car, suffocating heat and no food or water. The convoy stopped once, when the deportees were given something to drink by the Red Cross. Upon arrival in Paris, the deportees were taken by bus to Drancy.[10] This was the "deportation" at

8 The use of sealed freight cars for the deportation of Jews is partly explained by the difficulty of guarding any other means of transport. Convoys of 1000 in a passenger train required about 200 guards; convoys of freight cars many fewer. See Marrus and Paxton, *Vichy France and the Jews*, p. 259.

9 See Alain Lipietz's Web site for abundant information about this entire affair. http://lipietz.net/. For biographical details see, in particular, http://lipietz.net/spip.php?article1017, retrieved January 12, 2007.

10 See Georges Lipietz's videotaped testimony about these events, http://www.youtube.com/watch?v=TjdJrdlkUko, retrieved January 12, 2007.

issue in the SNCF case — not what is usually understood as deportation, namely being sent outside of France, and in the case of Jews to a death camp in Poland. The Lipietz family was never sent to Auschwitz, and indeed never left France during the war. They remained in Drancy until liberation of the camp and were freed on August 17, 1944, just before Allied troops entered Paris. Georges Lipietz launched his case against the SNCF with a petition filed in the Administrative Court in 2001; he died in April 2003. His cause has been energetically taken up by his two children, Alain, an economist and European Parliament Green Party deputy, and Hélène, a local politician from the Paris region.

After deliberating upon the arguments of all three parties, a three-judge panel of the Administrative Court of Toulouse found the French state and the SNCF liable "by reason of their role in the deportation of Jews during the Second World War." Specifically, the actions taken against the Lipietz family in 1944 were found to have constituted a "wrongful act" (*faute de service*) by the state and the SNCF. To compensate the plaintiffs for the injury they suffered the defendants were ordered to pay the plaintiffs 62,000 euros, to be divided between them. The French state was ordered to pay two-thirds of this amount, and the SNCF the remainder. While the state's role was defined by the Lipietz's detention in Toulouse and dispatch to Paris, the SNCF's liability seems to have sprung mainly from the conditions of the transport. The judgment does not elaborate on these important issues, however, and also offers no explanation about how the court determined the amount of damages. Notably, the court declined to pass judgment on the charge, made by the counsel for the plaintiffs, that the French state and the SNCF had been complicit in a crime against humanity. Although the state did not launch an appeal, the SNCF immediately did so. As we shall see, the result was an overturning of the Toulouse decision, and frustration, for a time at least, of the efforts to stigmatize the French railway company. This paper offers an assessment of what then transpired, and reflects upon the problems involved in this quest for legal liability.

Although there have been several attempts to bring the SNCF to court in the past decade or so, both in France and in the United States (on which more below), this is the first to have had some success. Ironically, the SNCF's own commitment to historical accuracy has played an important role in the successful litigation. In response to earlier charges, the SNCF committed itself to full disclosure of its wartime

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past. In 1992, in agreement with the *Institut d'histoire du temps présent*, a historical institute headed by the widely respected historian Henry Rousso and operating under the prestigious *Centre national de la recherche scientifique* (CNRS), the SNCF commissioned a detailed report on its wartime role, prepared by a historian, Christian Bachelier. Rousso maintains that the SNCF opened its archives for this project and cooperated fully in the inquiry. Bachelier's four-volume study, in all over 1500 pages, was completed in 1996 and made available two years later; it has been posted, both the full version and in summary, on the Internet.[11] Four years after the completion of this study the railway company's historical association organized a major conference on the issue, and the proceedings were published in 2001. As we shall see, the results of these efforts figured importantly in the case before the Administrative Court of Toulouse.

A final note regarding a sequel to this litigation: As a result of the Lipietz's original success, some 1800 complainants came forward in France to make their own claims against the French railways. These include Jews, homosexuals, American airmen and Gypsies, both for transportation within France and for deportation "to the east" from France.[12] Now, however, particularly in light of the failure in France, the scene may shift to the European Court of Human Rights in Strasbourg, or even to New York where a class action suit is being prepared and where hundreds more will seek to be heard in a class action suit before a federal court in Manhattan, apparently focusing on property taken from the deportees sent to the death camps.[13]

11 Christian Bachelier, *La SNCF sous l'occupation allemande, 1940–1944, rapport documentaire*, 4 vols. (Paris: IHTP-CNRS, 1996). For the Web version, see http: www.ahief.com. See also Jochen Guckes, "Le rôle des chemins de fer dans la déportation des Juifs de France," *Revue d'histoire de la Shoah. Le Monde Juif*, 165 (1999), pp. 29–110.

12 "Déportation: la SNCF coupable?" *L'Express*, January 30, 2007.

13 See Joseph Goldstein, "Holocaust Victims' Families Demand $162M from France," *The New York Sun*, August 30, 2006; "French, US Claimants Join Forces over SNCF Suit," Agence France Presse report, December 6, 2007, http://www.expatica.com/actual/article.asp?subchannel_id=25&story_id=34883, retrieved on February 20, 2007. The lawsuit in New York identifies as defendants not only the SNCF and the French state, but also the pension manager for French civil servants, the *Caisse de Dépôts et Consignations*. According to a press release of Harriet Tamen, a New York-based attorney who is coordinating the French and American claims,

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Let us turn now to the substance of the dispute, leaving aside some procedural and technical issues associated with the case. In keeping with the judicial forum, the defendants characterized what happened between Toulouse and the Gare d'Austerlitz somewhat differently from the discourse familiar to historians and the public at large. In the legally framed account, the train to Paris was not, or rather not merely, the climax of a concerted, ongoing, wide-ranging persecution of Jews in France; the transport was *illegal*. The Lipietz family did not want to go to Drancy, their counsel Rémi Rouquette explained to the court; they did not buy a ticket to Paris and were not, in effect, customers of the SNCF.[14] So the railway had no business having them on the train. On board, they had to endure the terrible material circumstances of the trip — packed in freight cars holding fifty-two people, with the windows blocked, without food, water, or even minimal sanitary facilities. More generally, as the plaintiffs' lawyer contended, there was no evidence that the Germans specifically *ordered* the railway to transport Jews in this inhumane way, and the SNCF, operating under the direction of the French Ministry of Interior, thereby became an accomplice in the state's wrongdoing. As Rouquette put it to the court, "not only did the SNCF do absolutely nothing to try to slow down the rhythm of transports it was responsible for [*dont elle était chargée*], it lent its energy to protesting against the Nazis' involvement in the exploitation of the railways . . . . It never did anything, or tried to do anything, to slow down the rhythm of the convoys, even after the Allied landings." Most shockingly, the French railway billed these transport services to the Ministry of the Interior at the third-class rate, and continued to demand payment even after the war had ended and France was liberated. The railways, Rouquette claimed, acted out of greed.[15]

the "victims and their families are demanding more than 125,000,000 euros for more than 700 claimants, including more than 100 survivors, for the trains and the time they spent in camps in France." Press Release/Letter of Harriet Tamen, Esq," Simon Wiesenthal Center, Europe, http://www.wiesenthal-europe.com/csw/CSW-Pages/SNCF-HarrietTamen_eng.html, accessed February 21, 2007.

14 See Tribunal Administratif de Toulouse, Audience du 16 mai 2006. Consorts Lipietz c/Etat & SNCF. Plaidoireie de Rémi Rouquette. This document may be found on the Web site of Alain Lipietz: http://lipietz.net/spip.php?article1856, retrieved January 25, 2007.

15 "Déportation: la SNCF coupable?" *L'Express*, January 30, 2007.

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To these charges, the defense claimed that the SNCF should not be held responsible for the transport of the Lipietz family because the company operated under a twofold constraint, the direction of the French state and the supervision of the German occupation. "*(E)xecution française et surveillance allemande*," as the historian Christian Bachelier put it — "French performance and German oversight."[16] Together, it was argued, these controls set conditions for the SNCF that deprived it of the capacity for independent action sufficient for a determination of liability. Requisitioned as a result of Article 13 of the Franco-German Armistice Agreement of June 22, 1940, in the wake of the French defeat at the hands of the Wehrmacht, the French railways operated at the behest of the Germans. Following a detailed account, Bachelier described the complex interaction of German control, French government initiative, and SNCF operational responsibility.

While it is easy to become tangled in some of the conceptual claims of both sides, there is in fact much common ground on basic historical facts. No-one disputes that the Germans set the deportation convoys in motion across western Europe in the summer of 1942. At a meeting in Berlin in June of that year the SS leadership demanded regular deportations from France, Belgium and the Netherlands. In France, *SS Hauptsturmführer* Theodor Dannecker, representing the deportation coordinator Adolf Eichmann, agreed to start with 100,000 Jews, with three convoys per week of 1000 Jews each. For his part, Lieutenant General Otto Kohl, the Wehrmacht's railway director in Paris, provided material support — both rolling stock and locomotives. That month, the trains began to roll: the convoys carried close to 1000 Jews as planned, with the victims packed into freight cars, often fifty or sixty per car. Freight cars were chosen, as indeed they were across Europe, because convoys that used them required fewer guards and the supervision was easier.[17] French railway men participated in the formation, direction and

16 Christian Bachelier, *La SNCF sous l'occupation allemande 1940–1944, IV, l'année 1942*, p. 4, available at http://www.ahicf.com/rapport/partie4.htm, retrieved September 16, 2006.

17 Renée Poznanski, *Etre juif en France pendant la Seconde Guerre mondiale* (Paris: Hachette, 1994), p. 420; Hillel Kieval, "Legality and Resistance in Vichy France: The Rescue of Jewish Children," *Proceedings of the American Philosophical Society*, 124 (October 1980), p. 335. Jorge Semprun, *Le grand voyage* (Paris: Gallimard, 1963), a brilliant fictional account of a five day transport in 1943, drew

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operation of the convoys, and turned everything over to the Germans at the border town of Novéant as the trains passed the French frontier heading eastwards.

The crucial question in the case, repeatedly raised both in court and in the public debate on the issue, concerned the railway company's "margin of maneuver," its capacity for independent action. On this specific point, historian Michel Margairaz, one of the experts on this subject who spoke at the June 2000 colloquium on the relations between the SNCF, the French state and the occupation authorities, was categorical. In an article that focused specifically on the "margin of maneuver" and shipments to Germany, he claimed that this diminished over time, but that by the second half of 1942 it was virtually nonexistent: "One can scarcely speak any longer ... of a real margin of maneuver for the SNCF after April and *a fortiori* November 1942, so true is it that every important question, even technical, relating to relations with the occupation authorities now operated at the level of the minister, or even the head of government, in order to fit into the policy of state-level collaboration...."[18] Referring to what he calls the "double subordination of the SNCF," Margairaz's conclusion was clear: "the margin of maneuver was weak from the summer of 1940, and became virtually nonexistent [*quasiment nulle*] after November 1942."[19]

Little discussed in the polemics of both sides was the role of the state. For if the SNCF was "requisitioned," might this not in a larger sense be the case for the French state, found by the Toulouse court to be two-thirds responsible for what happened to the Lipietz family between Toulouse and Paris? In brief, if Vichy could be condemned for its "*collaboration d'état*" in its relationship with the Germans, does logic not require that the SNCF also be condemned for its acquiescence to

on his own experience of deportation to Buchenwald. Similar conditions obtained with deportation transports in the Soviet Union during the Great Purges. For a harrowing account of a month-long deportation convoy to Vladivostok see Eugenia Semyonovna Ginzburg, *Journey into the Whirlwind* (New York: Harcourt, 1967), pp. 279–331.

18 Michel Magairaz, "La SNCF, l'Etat français, l'occupant et les livraisons de matériel: la collaboration ferroviaire d'Etat en perspective," in René Rémond, ed., *Une entreprise publique dans la guerre: la SNCF, 1939–1945* (Paris: Presses Universitaires de France, 2001), p. 79.

19 Ibid, p. 82.

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the demands of the state? The answer to this question, which pits most historians firmly against jurists who side with the judgment, is that the French railways were effectively, even if not fully legally, a part of the state apparatus and should be understood as such. Following the Armistice Agreement of 1940, the French authorities agreed not only to preserve the railway system intact, but to take charge of the operation of the system, putting it "at the disposition of the German transport director" [*à la disposition du chef allemande des transports*]. As with so many other dimensions of its "*collaboration d'état*," the Germans enticed the Vichy government into doing its bidding as the price for maintaining what it believed to be a measure of independence and its capacity to serve the country's transport needs. Practically speaking, as Michel Margairaz notes, this was window dressing. Progressively, in this system, the options for independence closed. Vichy had defined this system and Vichy alone had the capacity to do something about it. Responsibility, in brief, most properly belongs with the French state, and not with the SNCF.

* * *

Historians describe and analyze the processes by which man-made catastrophes occur. Courts, for their part, must render judgments, according to the law. In the SNCF case, these two approaches to the past were working at cross purposes. From the plaintiffs there is the raw appeal for justice, a call that springs from a well of frustration that for some will in all likelihood never run dry, regardless how individuals, companies, the courts or the nation respond. To the Lipietz family and other former deportees and their supporters, the Toulouse court responded to grievances that have persisted despite efforts of the French government over the past decade and more to contend with the Holocaust in France. "I have never forgotten and never forgiven," said one survivor on hearing of the judgment in Toulouse. "I want recognition, and if my children and grandchildren can receive financial compensation, all the better."[20] But for many others, including spokesmen for the railways,

20 Brette Kline, "Decision to Sue French Railway Divides Plaintiffs, Jewish Groups," Holocaust Restitution in the News, JTA, October 13, 2006. http://www.holocaustrestitution.net/JTA10132006.html, retrieved February 19, 2007.

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historians, and representatives of some Jews in France, the decision of the Toulouse court made no sense, either as a representation of history or as a mechanism by which victims and their descendants should come to terms with a horrific past. To them, the railways case seemed to open a Pandora's box. "We have entered into a dangerous and unhealthy process," said Henry Rousso at the time, fearing that a court-driven logic of recrimination, once begun, could go on indefinitely.[21]

"Whatever it is that the law is after it is not the whole story," the anthropologist Clifford Geertz once said.[22] And so it is with the case presented against the SNCF, however well-intended the supporters of the plaintiffs and however serious the wrong done to the Lipietz family more than sixty years ago. From the historian's perspective, the plaintiff's story and what the court accepted is seriously incomplete, lacking not only certain elements of context but also a generally validated sense of what is right, a correspondence with popular intuitions about a just resolution. Illustrating this divergence of views is a sharp difference of opinion on the significance of this case from the standpoint of Holocaust memory. In a recent exchange on this subject in a popular French history magazine, *L'Histoire*, Annette Wieviorka commented that she and the lawyer for the Lipietz family, Rémi Rouquette, were speaking two different languages.[23] Quite so. In what follows I address some instances of miscommunication and why I think they do harm to efforts to come to terms with the past.

At the very least, one would hope that the decision of the Toulouse court would have told us something about railways and the Holocaust. But even here there is no small degree of difficulty and confusion. Writ-

21 Anne-Charlotte De Langhe, "Déportation: les historiens défendent la SNCF," *Le Figaro*, September 1, 2006. "This is the continuation of the Papon trial," said Corninne Hershkovitch, a lawyer representing hundreds of people who are now pursuing their own claims against the SNCF. "Papon was the first individual to take the stand, and the SNCF may be the first company." Brett Kline, "Decision to Sue French Railway Divides Plaintiffs, Jewish Groups," Holocaust Restitution in the News, http: www.holocaustrestitution.net/JTA10132006 html, retrieved February 19, 2007.

22 Clifford Geertz, *Local Knowledge: Further Essays in Interpretative Anthropology* (New York: Basic Books, 1983), p. 173.

23 "La Réponse d'Annette Wieviorka," *L'Histoire*, 317 (February 2007), p. 27, replying to Rémi Rouquette, "Débat: la SNCF et la Shoah," Ibid, p. 26.

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ing on this subject more than thirty years ago, the late Raul Hilberg, the most distinguished pioneering analyst of the subject, contended that the railways had been overlooked, and he sought to set the record straight: "The railroads ...were involved not only at the fringe of the operation, but were indispensable at its core. Year after year they transported millions of Jews to the mysterious 'east' where victims could be annihilated quietly, out of the range of peering bystanders and prying cameras."[24] Ignored, perhaps, when Hilberg wrote: but hardly now. From Alan Resnais' *Nuit et brouillard* to Claude Lanzmann's *Shoah*, railways have become a familiar trope in the cinematic representation of the Holocaust; at the Holocaust museums at Yad Vashem and Washington, and in so many others, railway cars figure importantly, and symbolically, in communicating the scope and horror of the murder of European Jews. Memoirists and writers have repeatedly taken up the subject. Novelist and jurist Thane Rosenbaum has even identified a "Cattle Car Complex" as an intergenerational trauma deriving from the inhuman, remorseless transport to the camps.[25] A recent article in *Holocaust and Genocide Studies* explores a literary genre of "representations of spatial suffering." "If the centrality of deportations to the Final Solution is admitted," writes Simone Gigliotti, "then the testimony of displacement that results from such journeys must belatedly be accorded its historical and cultural place in understandings of the victims' experience."[26] For the writers, the scholars, curators of visual images, the museologists, and now the literary critics, the train has unmistakably arrived.

However, with the Lipietz case, unlike the sober analysis of the Bachelier volumes, the symbolic fit of the railways at issue with the Holocaust seems not quite right — both in the wider historiography and in the litigation discussed here. To start with context: while railways were a necessary element in the killing process, they can hardly be seen as an independent force working toward the Holocaust — unlike the case with Nazi anti-Jewish ideology or commitment, which historians

24 Raul Hilberg, "German Railroads/Jewish Souls," *Society*, 14 (November/December 1976), pp. 60–61.

25 Thane Rosenbaum, "Cattle Car Complex," in his *Elijah Visible: Stories* (New York: St. Martin's Press, 1996), pp. 3–11.

26 Simone Gigliotti, "'Cattle Car Complexes': A Correspondence with Historical Captivity and Post-Holocaust Witnesses," *Holocaust and Genocide Studies*, 20 (2006), p. 261.

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now agree was central and pervasive, bordering on the obsessive. Hilberg himself, always close to the documents, noted how difficult it was to untangle the oversight of deportation convoys from the wider administration of a continent-wide rail network. Focusing on the German railways, the Reichsbahn, he noted how deportation trains were always subsumed under the "larger picture" of rail traffic — although this too had its terrible significance for the Jews. What were sometimes called "resettlement transports" were "numerically insignificant," perhaps as few as ten transports a day, out of a total of 20,000 across Europe. "The Reichsbahn moved troops and industrial cargo, soldiers on furlough and vacationers, foreign laborers and Jews. Sometimes space was preempted by the army or some other claimant, but Jewish transports were put together whenever and wherever there was a possibility of forming a train. They too had some priority."[27] In a useful corrective to the exaggerated numerical significance of these convoys, Bachelier reminded French readers of the particular place of deportation convoys. Over the course of the Holocaust the Reichsbahn organized some 3000 "special transports" of Jews to extermination camps between October 1941 and October 1944: these represented merely 15 percent of the number of freight trains in *one day* on its lines."[28] In the overall scheme of things, the material effort expended to transport the Jews to their deaths was insignificant.

This needs to be kept in mind as we try to understand the place of the Lipietz's convoy of 1944. That shipment, of course, was not part of the European-wide transport to extermination camps — at least not directly. The Lipietz's excruciating thirty hours were endured while traveling from Toulouse to the Gare d'Austerlitz in Paris — a convoy with no direct lethal consequences, or at least none that we know of. As well, reference to the SNCF's French operations raises an issue that was hardly lost on a French audience and which raised the hackles of at least some of those who followed this story: namely, the railway men whom the plaintiffs presented as perpetrators of crimes against humanity were not ideologically motivated underlings of the *Staatssekretäre* of the German Transport Ministry or the proud hierarchs of the Reichsbahn in

27 Hilberg, "German Railroads/Jewish Souls," p. 67.

28 Christian Bachelier, "L'Année 1942," http://www.ahicf.com/rapport/partie4.htm, retrieved February 12, 2007.

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France, but rather unnamed SNCF officials and more numerously the *cheminots*. These were the French railway men around whom there has been created, with some justification, an aura of heroic resistance to the Nazi occupation, with 1647 of them shot or murdered in deportation for resisting the enemy. They were bestowed with the collective award of the Legion of Honor for their heroic wartime sacrifices and were represented in film and history as one of the exceptions to the otherwise shabby history of wartime collaboration.[29] In France, the railways not only have Holocaust-related significance, they have been traditionally associated with the sacrifices of the Resistance. Add to this what has already been noted about the SNCF, the "democratic" public utility, with its left-leaning workers and its efficient public service and you have a very poor fit, in the eyes of ordinary French men and women, between the accused company and the public's image of the heartless perpetrators of crimes against humanity.

There are also reasons embedded in historical representation why the SNCF case does poorly as an effort to present a public object lesson about complicity in the Nazi Holocaust. A major difficulty for the public at large, to whom presumably this lesson is directed, is the sheer passage of time, the fact that these transports occurred more than sixty years ago, which is practically speaking beyond commonsense notions of continuing institutional accountability for administrative wrongs. Following a legal and not narrative logic, the Administrative Court of Toulouse held that the prescribed four year statute of limitation for bringing such complaints only began to apply the moment that the state was deemed, in 1997, in the case of Maurice Papon, to have legal liability for Holocaust-related events, and also when information of wrongdoing was made available to the plaintiffs with the completion of the Bachelier report in 1996 and the SNCF colloquium in 2000. But while for the lawyers seeking to establish the SNCF's liability this argu-

29 Christian Bachelier, "Le développement de la résistance des cheminots," http://www.ahicf.com/rapport/partie6.htm, retrieved February 12, 2007. See reference to the historical exhibit, "Les Cheminots dans la Résistance — 29 novembre 2005–15 avril 2006: dossier de presse," Mémorial du Maréchal Leclerc de Hauteclocque et de la Libération de Paris, Musée Jean Moulin, http://www.v1.paris.fr/musees/memorial/cheminots-dp.pdf, retrieved February 12, 2007. For an indication that the reputation for resistance is a sensitive point, see Alain Lipietz, "Non, M. Gallois, la SNCF n'était pas unanimement résistante!" *Le Figaro*, June 28, 2006.

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ment made perfect sense and was entirely consistent with the notion of a persisting corporate identity, to most onlookers the legally accepted notion that the SNCF of 2006 was effectively, for purposes of historic responsibility, the same as that of 1944 was attenuated if not unconvincing. The logic of the courts, in this case, confronted popular intuitions about justice — a confrontation unlikely to promote a sense of justice rendered for the Holocaust.

Compounding this difficulty is the not unjustified perception that it was precisely the railway company's efforts to acknowledge its wartime past that exposed it to litigation and condemnation by the judges in Toulouse. Certainly the plaintiff's efforts to stigmatize the SNCF as a criminal organization sat oddly with the company's actions in the lead-up to this case: making available its wartime archives to historians; commissioning the lengthy Bachelier report and posting it on the Internet; providing financial assistance to the principal research center devoted to the Holocaust in France, the *Centre de documentation juive contemporaine*; and even the opening of its train stations between 2002 and 2004 to a traveling exhibition on the deportation of Jewish children organized by Serge Klarsfeld.[30] As an exercise in public pedagogy the actions of the SNCF seem far less the machinations of an excuse-seeking wrongdoer than that of a company committed, however belatedly, to full transparency and the release of information about its wartime past — what the French refer to as their duty of memory, or *devoir de la mémoire*.[31]

Critics of the Toulouse judgment did not, in my reading, belittle the cruelty of the deportation transports or of widespread complicity of *cheminots* in the gigantic effort to stigmatize, persecute, and eventually deport close to 80,000 Jews in France. However, the difficulty in singling out an organization such as the SNCF, and particularly a judicial reckoning more than sixty years after the event, is precisely the diffusion of responsibility for the Holocaust, what Hannah Arendt referred to as the "moral collapse" that the Nazis caused everywhere in European

30 See Pierre-François Veil and Patrick Klugman, "La SNCF a déjà payé pour la Shoah," *Le Figaro*, September 28, 2006.

31 "Condamner la SNCF a-t-il un sense soixante ans après?" *La Croix*, June 8, 2006. For a different view, see Jean-Marc Dreyfus, "La SNCF rate le train de l'histoire," *Libération*, September 8, 2006.

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society — an insidious process that became ubiquitous, affecting every part of society and extending even in some cases to the victims themselves.[32] As more than one observer has noted, the judgment against the French railway company ineluctably posed the question of how far legally driven pedagogy should go. "If the SNCF is guilty," lawyer Arno Klarsfeld was widely quoted as saying, "then the guy who drove the bus is guilty, the guy who provided the gas is guilty, the person who typed the lists is guilty." And he continued, underscoring the feeling that the judgment stretched a judicially determined liability too far: "The danger is that if everyone is guilty, then no one is guilty..."[33] To be fair, the Administrative Court of Toulouse was not engaged in a criminal proceeding; it did not pronounce on guilt, but rather *liability* — and liability for one particular convoy, sent from Toulouse to Paris. If anything, this formulation compounds the problem of historical representation: the judgment of the court seemed not only to open the floodgates of liability claims — against the railways, and certainly for transports other than those of the Jews — but also appeared to put the actions of the *cheminots* on the same level as that of top decision-makers at Vichy, those who had the capacity to direct French collaboration with the German occupation.[34]

The question of how far should one go, or perhaps how far *can* one go, in the quest for legal remedies, raises the prospect of the trivialization, which is sometimes seen as the ineluctable result of opening the courts to an ever-expanding quest for judicial certification of complicity

32 See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), pp. 125–126.

33 Susan Sachs, "Railway Chided for Holocaust Role," *Christian Science Monitor*, June 16, 2006. The flamboyant attorney Arno Klarsfeld, son of Nazi-hunters Serge and Beate Klarsfeld, is representing the SNCF in the New York-based case against the SNCF.

34 This was certainly the view of Serge Klarsfeld, who contrasted the historical impact of the SNCF case with those of the Vichy leaders such as police chief René Bousquet and high-ranking Vichy bureaucrat Maurice Papon. For Klarsfeld, the principal historical background issue was the wartime status of the SNCF as operating under German and Vichy authority: "Many people had their houses and businesses and cars requisitioned," he was quoted as saying. "Should they be charged today? The answer is no. Only the really top decision makers should ever have been sought out." Brett Kline, "Jewish Fear Backlash from Compensation Ruling," *Jewish News Weekly*, June 16, 2006.

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in the Holocaust. Champions of the plaintiffs in this case responded that they have never received compensation for the specific assaults on human dignity and the privations and suffering caused by deportation and remind us that what is at issue here is part of individuals' continuing quest for justice. Rémi Rouquette asks the lawyer's question: Victims of any other civil wrongs — hospital patients, airline accidents, or victims of defamation — all can expect to receive reparation: why should not the victims of this monumental crime, sixty years later?[35] The question is a fair one, but even a positive answer does not, it seems to me, require that the SNCF be found "guilty" or that the heirs of Georges Lipietz should retain the judgment in their favor.

Notwithstanding the misapplication of legal terminology appropriate to this case, the issue for the public at large remains whether, after so many years, the railways are to be understood as "guilty" or "innocent."[36] It is as if the courts were the only vehicle available to victims of the Holocaust to come to terms with the wrongs done to them. Overlooked in this discussion, I believe, is the question of how far France has *already* gone — not only in terms of history and memory but also in terms of concrete restitution to survivors of the Holocaust. Astonishingly, defenders of the judgment often claim that it is only through the courts that historical justice and reparation can be achieved. According to one recent claim, for example, the Toulouse court "said publicly what it took French leaders 50 years to acknowledge."[37]

It should hardly be necessary to point to nearly a quarter of a century of extensive publication and discussion of the Holocaust in France, and notably the French complicity in the stigmatization, persecution, rounding up and deportation of the Jews. Beginning with the cinema in the

35 See the exchange between Rémi Rouquette and Annette Wieviorka in "Débat: la SNCF et la Shoah," *L'Histoire*, 317 (February 2007), pp. 26–27.

36 See, for example, two commentaries on the possible outcome of the appeal process: "Déportation: la SNCF non coupable?" *L'Express*, January 30, 2007; "Déportation: la SNCF pourrait finalement être innocente," *Nouvel Observateur*, January 31, 2007. Notwithstanding the fact that what is at issue in this case is liability, press reports continue to use the language of guilt or innocence, reflecting what I think is the popular view of what is at stake. See, for example, Angelique Chrisafis, "French State and SNCF Guilty of Collusion in Deporting Jews," *The Guardian*, June 7, 2006.

37 "Railway Chided for Holocaust Role," CBS News report, June 16, 2006.

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1970s and extending to detailed, archive-based historical analysis in the 1980s, there has been a detailed, many-sided, and highly professional examination of the subject in all of its ramifications, including the collusion of much of French society in the wrongdoing. Immediately after the war, it is true, French government leaders believed that administrative tribunals should not be open to what they feared would be a host of appeals from former victims of the Vichy regime based on the idea of state responsibility — a view that was established in law in 1946 by the *Conseil d'Etat*, France's highest administrative tribunal, then headed by the Free French leader René Cassin.[38] Instead, the French state undertook to right wartime wrongs through various programs of restitution and reparation — and did so sometimes inadequately, incompletely, and unjustly, although not always so.

Over time, there were improvements. Sometimes these came through a deeper understanding of the historical processes of persecution, and sometimes through concrete responses to the demands of former victims. Other forces were also at work internationally — pressures on governments from the World Jewish Congress, and the examples followed as a result of these pressures in Germany, Switzerland and Austria. In 1995, following the stonewalling of President François Mitterand, his successor Jacques Chirac eloquently reiterated French responsibility for wartime crimes against the Jews. In the years that followed there were further efforts at compensation, notably to the children of Holocaust victims. The most important efforts were the Mattéoli inquiry, established by the government of Alain Juppé in 1997 to study the spoliation of Jewish property during the Vichy period, and the related commission headed by Pierre Drai to determine compensation for victims of these robberies. As a result of the work of the latter there were new and important efforts at restitution, involving not only the returning of assets to individuals but the establishment of the *Fondation pour la Mémoire de la Shoah* as a national Holocaust commemorative, research and education institution, with an endowment of 2.4 billion francs ($342 million) of estimated Jewish property value stolen during the war. There was also a government decree in 2000, modified in 2004, providing for the indemnification of the orphans of murdered Jewish deportees. Most

38 This jurisprudence was overturned by the *Conseil* in April 2002 as a result of the proceedings against Maurice Papon.

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observers agree that, while belated, these settlements have been fair. Serge Klarsfeld has argued that the reparations process can be favorably compared with that of any other European country.[39] Perhaps inevitably, some remain dissatisfied. This is what has animated the SNCF plaintiffs — but not, one should note, the leaders of established Jewish organizations in France. From that quarter came not only principled opposition, but also fears, not generally articulated publicly, of a possible backlash against the Jews of France.[40]

There is a postscript to this story of the Toulouse judgment, which transpired after this paper was presented at the Yad Vashem Conference on the Holocaust and Justice in December 2006. On March 27, 2007, the plaintiffs suffered a severe setback when, in response to an appeal by the SNCF, the Administrative Appeal Court in Bordeaux reversed the Toulouse decision and declared the railway company had acted under the authority of the Vichy government and the German occupation. The SNCF, the court said in effect, had acted under governmental authority and hence could not be held independently liable. The Appeal Court, therefore, had no jurisdiction in the case. Months later, in December 2007, the matter went to the *Conseil d'Etat*, which pronounced definitively against the plaintiffs' appeal.[41]

After the passage of so many decades it should be evident how things can go wrong, as they did in this case, when litigants seek to draw too tight a circle of legal accounting around an event, thereby distorting not only the memory and historical representation of one part of the Holocaust but also losing sight of the wider quest for historical justice. The SNCF case has had a global resonance that doubtless will continue if the case sees the light of day in a European Court of Human Rights in Strasbourg or in a class action court in New York. To most historians, however, there is an air of unreality about the lawyers' persistent efforts to pursue their quarry. "This is a critical issue for the French," says an American attorney in Paris collecting defendants for a new as-

39 Anne-Charlotte De Langhe, "Déportation: les historiens défendent la SNCF," *Le Figaro*, September 1, 2006.

40 Brett Kline, "Jews Fear Backlash from Compensation Ruling," *Jewish News Weekly*, June 16, 2006.

41 For the complete decision and the accompanying press statement see the Web site of the *Conseil d'Etat* (http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0743.shtml), last visited on February 21, 2008.

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sault on the French railways. "It's not only an issue of money, but of responsibility. What role did the SNCF play in this crime?"[42] For such continuing efforts, it is as if there has been no detailed history of these matters, no Bachelier report, and for that matter none of the extensive historiography of Vichy and its role in the Holocaust. To this observer, pursuing this branch of the state apparatus for crimes of the occupation period sixty years after the fact makes no sense — particularly in the light of a lengthy process by which the French state has solemnly assumed, both rhetorically and materially, its part of the responsibility for the Holocaust in France. Listening to some of the former victims, I can appreciate their nightmarish frustration, their sense of insufficiency about reparation and restitution, and their anger at mistakes and snubs that have been made along the way. But as Michel Zaoui, former counsel for the civil parties in the Papon case commented shortly after the issuing of the Toulouse judgment: "At a certain point, one has to say: 'That's enough!'"[43] For many observers, the SNCF case may well have been that point.

42 Mary Papenfuss, "A Railway that did the Nazis' Bidding," *Philadelphia Inquirer*, January 29, 2007.

43 "'Cette procédure ne fait pas de sens,'" *L'Humanité*, August 31, 2006. For a similar point of view, see Henry Rousso, "La France n'en a pas fini avec ces années noires," *Libération*, February 19, 2007, and notably his conclusion: "J'ai la conviction profonde, comme citoyen et comme historien, qu'il n'est pas moralement légitime de considérer que la République est encore comptable des crimes commis par Vichy. L'un des principaux effets du procès Papon est d'avoir permis que la France soit aujourd'hui l'un des pays européens qui a été le plus loin dans une politique de réparation et de reconnaissance plus de soixante ans après la guerre."

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No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL., PETITIONERS

v.

ROYAL DUTCH PETROLEUM CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTEREST OF THE UNITED STATES

This Court directed the parties to file supplemental briefs addressing whether and under what circumstances the Alien Tort Statute (ATS), 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, including the exposure of U.S. officials and nationals to exercises of jurisdiction by

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foreign states, for the Nation's commercial interests, and for the enforcement of international law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court explained in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712, 724 (2004), that the ATS "is in terms only jurisdictional" and does not create a statutory cause of action. The ATS does permit courts to create a federal common-law cause of action for violations of international law in certain limited circumstances. But any such cause of action is not created or prescribed by international law. Rather, a private right of action fashioned by a court exercising jurisdiction under the ATS constitutes application of the substantive and remedial law of the United States, under federal common law, to the conduct in question—albeit based on an alleged violation of an international law norm. See *id.* at 712, 720, 721, 724, 725-726, 729-730, 731 & n.19, 732, 738.

In *Sosa*, the Court made clear that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [the three] historical paradigms"—violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S. at 724, 732. In setting forth that threshold requirement, the Court did not purport to define a full set of "criteria for accepting a cause of action subject to jurisdiction under [Section] 1350." *Id.* at 732; see *id.* at 733 n.21 ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law."); *id.* at 738 n.30 (noting that the "demanding

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standard of definition" must first "be met to raise even the possibility of a private cause of action").

The relevant question is whether a court should create a federal common-law cause of action *today* to redress an alleged international law violation, in light of present-day criteria for recognizing private rights of action and fashioning federal common law. The text of the ATS, a jurisdictional statute, does not answer that question. Courts, however, should be guided at least in general terms by the legislative purpose to permit a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the United States accountable, which is an important touchstone for determining whether U.S. courts should be deemed responsible for affording a remedy under U.S. law. See *Sosa*, 542 U.S. at 714-718, 722-724 & n.15. And while canons of statutory construction, such as the presumption against extraterritorial application of an Act of Congress, see *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878 (2010), are not directly applicable to the fashioning of federal common law, the underlying principles counsel similar restraint in the judicial lawmaking endeavor.

Although the Court in *Sosa* did not attempt to delineate all of the factors courts exercising jurisdiction under the ATS should consider in deciding whether to "recognize private claims under federal common law," 542 U.S. at 732, it did provide some guidance. The relevant considerations include the modern conception of the common law; evolution in the understanding of the proper role of federal courts in making that law; the general assumption that the creation of private rights of action is "better left to legislative judgment," including the decision whether "to permit enforcement without the

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check imposed by prosecutorial discretion"; "the potential implications for the foreign relations of the United States"; concerns about "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and the absence of a congressional mandate. *Id.* at 725-728. Courts should also consider "the practical consequences" of making a "cause [of action] available to litigants in the federal courts," *id.* at 732-733; exercise "great caution in adapting the law of nations to private rights," *id.* at 728; and operate under a "restrained conception" of their "discretion" to consider "a new cause of action of this kind," *id.* at 725.

There is no need in this case to resolve across the board the circumstances under which a federal common-law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country. In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS. *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), for example, involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay. The individual torturer was found residing in the United States, circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator. And Congress, in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), subsequently created an express statutory private right of action for claims of torture and extrajudicial killing under color of foreign law—the conduct at issue in *Filartiga*.

This Office is informed by the Department of State that, in its view, after weighing the various considerations, allowing suits based on conduct occurring in a

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foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights. For this reason, and because Congress has created a statutory cause of action for the conduct at issue in *Filartiga*, there is no reason here to question the result in that case. Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise.

In the circumstances of this case, the Court should not fashion a federal common-law cause of action. Here, Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing torture, extrajudicial killing, crimes against humanity, and arbitrary arrest and detention in Nigeria. Especially in these circumstances—where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country—the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could. A decision not to create a private right of action under U.S. law in these circumstances would give effect to the Court's admonition in *Sosa* to exercise particular caution in deciding whether, "if at all," to consider suits under rules that would "claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727-728.

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ARGUMENT

A COURT MAY IN APPROPRIATE CIRCUMSTANCES FASHION A FEDERAL COMMON-LAW CAUSE OF ACTION BASED ON THE ALIEN TORT STATUTE FOR CERTAIN EXTRATERRITORIAL VIOLATIONS OF THE LAW OF NATIONS, BUT A PRIVATE RIGHT OF ACTION IS NOT AVAILABLE UNDER THE CIRCUMSTANCES OF THIS CASE

A. There Are Circumstances In Which A Court May Recognize A Federal Common-Law Cause Of Action Based On The ATS For Extraterritorial Violations Of The Law Of Nations

A close examination of the historical context and purposes of the ATS, the modern-day line of cases, and congressional action suggests that there are circumstances in which it would be appropriate for a court to recognize a cause of action based on the ATS for violations of international law occurring outside the United States. But the question whether a court should fashion a federal common-law cause of action under the ATS for a violation of the law of nations occurring in the territory of a foreign sovereign calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion.

1. As explained in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004), piracy is one of the paradigmatic torts in violation of the law of nations and one of the specific offenses for which "the First Congress understood that the district courts would recognize [a] private cause[] of action." Piracy is an offense that typically occurs on the high seas, *i.e.*, outside the territorial jurisdiction of any state. See Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113-114 (criminalizing "piracy" defined as "murder or robbery, or any other offence which if committed

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within the body of a county, would by the laws of the United States be punishable with death" if committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state"); 4 William Blackstone, *Commentaries on the Laws of England* 72 (1769) (defining piracy as "those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"); see also *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-162, 163 n.a (1820). Accordingly, courts may appropriately fashion a federal common-law cause of action for piracy and, perhaps, other law-of-nations violations occurring outside the territorial jurisdiction of *any* sovereign.

As to whether violations occurring within the territory of a foreign sovereign would also have given rise to a cause of action cognizable under the ATS, the early history is sparse. Attorney General William Bradford's 1795 opinion considered the possibility of prosecuting American citizens who had taken part in the attack by a French fleet on a British slave colony in Sierra Leone. 1 Op. Att'y Gen. 57, 58. Based on the diplomatic correspondence submitted to Attorney General Bradford and certain language in the opinion itself, it appears that the alleged unlawful acts occurred in part on land. *Ibid.* (noting that the attack was on "the settlement" and involved the "plundering" and destruction of property "on that coast"); see Pet. Supp. Br. App. B1-B3 (describing capture of Freetown and Bance Island and noting that American citizens had "land[ed]" in Freetown and that, "with arms in his hands," one American had headed to "the house of the acting Governor"). Attorney General Bradford explained that criminal prosecution was not an option to the extent "the transactions complained of

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originated or took place in a foreign country," and expressed "some doubt" as to whether it would be possible to prosecute the Americans criminally if the "crimes [were] committed on the high seas." 1 Op. Att'y Gen. at 58-59. In contrast, he opined, "there can be no doubt that" those injured by the American citizens' "acts of hostility have a remedy by a *civil* suit in the courts of the United States" under the jurisdiction granted by the ATS. *Id.* at 59. It is not entirely clear whether Attorney General Bradford believed that federal courts would be open to entertain a tort action under the ATS for an attack occurring within the territory of a foreign sovereign, or only for conduct occurring on the high seas. But he plainly knew that some of the conduct at issue occurred within the territory of Sierra Leone, and his reference to "acts of hostility" for which the ATS afforded a remedy could have been meant to encompass that conduct. *Ibid.*[1]

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[1] The United States advanced a different reading of the 1795 opinion in a previous submission to this Court. See U.S. Amicus Br. at 15-16, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (asserting that Bradford's opinion stood for the proposition that an "ATS suit could be brought against American citizens for breaching neutrality with Britain only if acts did not 't[ake] place in a foreign country'") (quoting 1 Op. Att'y Gen. at 58-59) (brackets in original); see also *id.* at 13. On further reflection, and after examining the primary documents, the United States acknowledges that the opinion is amenable to different interpretations. Another source of ambiguity (recognized by the Court in *Sosa*, 542 U.S. at 721) is whether the opinion implicates the ATS's "law of nations" provision at all, or whether the offense involved violation of a treaty. See 1 Op. Att'y Gen. at 58; *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 811 (9th Cir. 2011) (en banc) (Kleinfeld, J., dissenting), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011).

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The events leading up to the passage of the ATS (the "so-called Marbois incident" involving an assault in Philadelphia on the Secretary to the French Legation, and the episode that ensued when a New York constable entered the residence of a Dutch diplomat to serve process) both occurred within the territory of the United States. See *Sosa*, 542 U.S. at 716-717; William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-494 (1986). But the circumstances in which a cause of action in a U.S. court might have been deemed appropriate to adjudicate an action alleging that a person violated the law of nations, and to hold the perpetrator accountable under U.S. law, see *Sosa*, 542 U.S. at 714-718, 722-724 & n.15, would not necessarily have been limited exclusively to conduct occurring in U.S. territory. After all, the Sierra Leone episode (which clearly occurred outside the territory of the United States and appears to have occurred, at least in part, within the territory of a foreign sovereign) prompted a formal protest from Great Britain regarding the role of American citizens in the attack. Cf. *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 802 (9th Cir. 2011) (en banc) (Kleinfeld, J., dissenting) (noting that "[t]he concern was that U.S. citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system") (citation omitted), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that "[t]he focus of attention * * * was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien"), cert. denied, 470 U.S. 1003 (1985).

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2. Modern litigation under the ATS has focused primarily on alleged law-of-nations violations committed within foreign countries. *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980), involved allegations of torture committed by a former Paraguayan police inspector against a Paraguayan citizen in Paraguay. And, in the ensuing decades since *Filartiga*, federal courts have either assumed or, in at least one case, expressly held that violations of the law of nations arising in a foreign country could be brought based on the ATS. See *Trajano* v. *Marcos*, 978 F.2d 493, 499-501 (9th Cir. 1992) (holding that "subject-matter jurisdiction" under the ATS was appropriate "even though the actions" of the foreign defendant "which caused" the foreign plaintiff "to be the victim of official torture and murder occurred" in the Philippines), cert. denied, 508 U.S. 972 (1993).[2]

Congress has "expressed no disagreement" with the view that some extraterritorial causes of action may be recognized under the ATS, see *Sosa*, 542 U.S. at 731, either through the passage of prohibitory legislation or otherwise. When it enacted the TVPA, Congress recognized uncertainty in the lower courts about the existence

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[2] More recently, the Ninth Circuit sitting en banc reaffirmed its holding in *Trajano*. See *Sarei*, 671 F.3d at 744-747; *id.* at 780-783 (McKeown, J., concurring in part and dissenting in part). But see *id.* at 797-818 (Kleinfeld, J., dissenting). And the Seventh and D.C. Circuits likewise have concluded that a federal common-law cause of action based on the ATS could be fashioned for at least some extraterritorial violations of the law of nations. See *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 20-28 (D.C. Cir. 2011); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011). But see *Doe*, 654 F.3d at 72, 74-81 (Kavanaugh, J., dissenting in part). A petition for a writ of certiorari has been filed in *Sarei* (No. 11-649) and a petition for rehearing en banc has been filed in *Doe* (No. 09-7125 D.C. Cir.).

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of a federal cause of action in suits based on the ATS, and it responded by creating an express private right of action specifically for claims of torture and extrajudicial killing under color of foreign law—the conduct at issue in *Filartiga*. The legislative history noted that *Filartiga* had been "met with general approval" and explained that Congress was providing "an unambiguous and modern basis for a cause of action that has been successfully maintained under" the ATS. H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 3-4 (1991) (*House Report*); see S. Rep. No. 249, 102d Cong., 1st Sess. 4-5 (1991) (*Senate Report*). The congressional reports also stated that the ATS should otherwise "remain intact" because "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [S]ection 1350." *Senate Report* 5; *House Report* 4.

At the same time, however, Congress did not respond to the uncertainty regarding the existence of a federal cause of action that could be brought under the jurisdictional grant in the ATS by amending the ATS itself to provide a cause of action for any violation of the law of nations or a treaty of the United States; nor did it enact a special statute creating an express private right of action for violations of international law generally. See *Sosa*, 542 U.S. at 728. In the end, then, we think the TVPA, while demonstrating that Congress knew how to create a private right of action in this context when it wanted to do so and that it approved of the result in *Filartiga*—and while perhaps somewhat instructive in other respects—is best regarded as essentially leaving considerations bearing on recognition of a federal common-law cause of action under the ATS where it found them.

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Nor do we believe that *Sosa* itself resolves the question whether or when a cause of action should be recognized based on conduct occurring in a foreign country. In *Sosa*, the Court did not disapprove of *Filartiga* or similar ATS cases. And the Court did not suggest that courts lack authority to recognize a federal common-law cause of action based on extraterritorial conduct under any circumstances. The alleged violation before the Court occurred in Mexico (albeit, allegedly at the behest of the United States), *Sosa*, 542 U.S. at 698, 700-701, and the United States had argued that the extraterritorial nature of the conduct presented an "additional reason" to reverse the court of appeals, U.S. Resp. Br. Supporting Pet. at 46-50, *Sosa*, *supra* (U.S. *Sosa* Br.). The Court did not discuss the issue of extraterritoriality, instead disposing of the case on the separate ground that the norm of international law at issue was not sufficiently specific or well defined to be actionable. *Sosa*, 542 U.S. at 731-738.

The Court did note that it would "certainly consider" a requirement that the claimant must have exhausted any remedies in the domestic legal system, and perhaps in other forums such as international claims tribunals, "in an appropriate case." *Sosa*, 542 U.S. at 733 n.21. Because exhaustion of such remedies would be necessary only if a cause of action based on the ATS could be premised on conduct occurring in a foreign country, the *Sosa* Court seemed to contemplate recognition of an extraterritorial cause of action under the ATS in at least some circumstances. But, at the same time, the Court identified factors counseling caution: that creation of a federal cause of action is primarily a legislative function; that suits under the ATS present foreign relations issues; that private litigation is not subject to the exercise

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of prosecutorial discretion; and that a common-law cause of action based on allegations concerning a foreign government's treatment of its own people should be created, if at all, only with great caution. See *id.* at 725-728.

Thus, while *Sosa* does not resolve more generally the various questions concerning the fashioning of federal common law under the ATS for conduct occurring in a foreign country, recognizing an extraterritorial cause of action under the ATS in certain circumstances would be consistent with *Sosa*. Moreover, it is the view of the Department of State that recognizing a cause of action in the circumstances of *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights. The considerations identified in *Sosa* and in this brief should be taken into account in assessing whether a private right of action should be fashioned under U.S. federal common law in suits brought pursuant to the jurisdictional grant in the ATS, based on the circumstances presented.

B. This Court Should Not Fashion A Federal Common-Law Cause Of Action Based On The ATS Under The Circumstances Of This Case

In *Sosa*, this Court urged "great caution" and called for "vigilant doorkeeping" before exercising a court's federal common lawmaking authority to "adapt[] the law of nations to private rights." 542 U.S. at 728, 729. In this case, foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory, without any connection to the United States beyond the residence of the named plaintiffs in this putative class action and the corporate defendants' presence for jurisdictional purposes. Creating a federal common-law cause of ac-

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tion in these circumstances would not be consistent with *Sosa*'s requirement of judicial restraint.[3]

1. The historical context of the ATS lends no support to recognizing a private right of action challenging the acts of a foreign sovereign in its own territory. The two incidents leading up to the enactment of the ATS (the Marbois incident and its "reprise," see *Sosa*, 542 U.S. at 716-717; p. 9, *supra*), both occurred in the United States and did not involve the acts of a foreign sovereign. The few contemporaneous cases referring to the ATS involved violations allegedly committed within the territory of the United States, and neither involved the exercise of jurisdiction over a suit involving the acts of a foreign sovereign in its own territory. See *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit brought by French privateer against third party for wrongful seizure of slaves from vessel while in port in the United States); *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) (dismissing suit, for lack of jurisdiction, brought by owners of British ship for seizure,

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[3] The United States does not suggest that an extraterritorial private cause of action would violate international law in this case. The TVPA, for example, provides an express cause of action against an individual who, under color of foreign law, subjects another individual to torture or extrajudicial killing. TVPA § 2(a), 106 Stat. 73. The TVPA thus plainly contemplates a cause of action based on conduct occurring in a foreign country. See also 18 U.S.C. 2340A. The Court's decision in this case therefore should not cast doubt on the propriety of the United States, through appropriate lawmaking processes, to impose civil or criminal sanctions for torture committed in a foreign country. Cf. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The issue in this case, concerning whether a private right of action should be created by the courts as a matter of federal common law, is instead solely one of the allocation of responsibility among the Branches of the United States Government for creation of private rights of action under U.S. law.

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allegedly in United States territorial waters, by French privateer). And the possible ATS suit contemplated by Attorney General Bradford's 1795 opinion would not have entailed an adjudication of the conduct of a foreign sovereign in its own territory (*i.e.*, the British Government in Sierra Leone). See 1 Op. Att'y Gen. at 59. The suit he apparently had in mind would instead have been brought against the American citizens.

Moreover, as a general matter, the First Congress likely believed that U.S. courts should not judge a foreign sovereign's actions within its own territory through private civil suits. See Letter of George Washington to James Monroe (Aug. 25, 1796), *in* 35 *The Writings of George Washington from the Original Manuscript Sources 1745-1799*, at 189 (John C. Fitzpatrick ed. 1940) ("[N]o Nation had a right to intermeddle in the internal concerns of another."); see also *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (No. 15,551) (Story, J.) ("No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy."); *Sosa*, 542 U.S. at 714 (explaining that law-of-nations violations between states "occupied the executive and legislative domains, not the judicial"); cf. *La Amistad de Rues*, 18 U.S. (5 Wheat.) 385, 390-391 (1820); *Juando* v. *Taylor*, 13 F. Cas. 1179, 1189 (S.D.N.Y. 1818) (No. 7558).

2. a. The question whether a cause of action should be fashioned today as a matter of federal common law in the circumstances of this case must take account of present-day principles governing judicial creation or recognition of private rights of action. In particular, it must take account of the principles underlying the pre-

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sumption against extraterritorial application of federal statutes, especially where the alleged conduct has no substantial connection to or impact on the United States. That presumption is grounded in significant part on the concern that projecting U.S. law into foreign countries "could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). It reflects not only a judgment about the appropriate exercise of the United States' power to impose its law to govern conduct and afford remedies for injuries sustained in foreign countries, but also a corresponding respect for the sovereign authority of other states. See *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004); see also *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878, 2885-2886 (2010).

Those principles should inform the decision whether to recognize new federal common-law causes of action—especially under the ATS, the predominant purpose of which was to "avoid[], not provok[e], conflicts with other nations," *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring). In *Sosa*, this Court recognized that allowing U.S. courts to pronounce "a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits," would have "potential implications for the foreign relations of the United States" and would risk "adverse foreign policy consequences." 542 U.S. at 727-728. Indeed, the Court questioned whether a court should entertain "at all" a suit under the ATS seeking to enforce such a limit. *Id.* at 728. Foreign governments are typically immune from suit under the Foreign Sovereign Immunities Act of 1976 to adjudicate violations of international law they allegedly have committed, 28 U.S.C.

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1604, 1605(a)(5) (2006 & Supp. IV 2010). See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 436-438 (1989) (no jurisdiction over foreign states under ATS); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351-353, 363 (1993) (Kingdom of Saudi Arabia immune from suit alleging torture by police). Yet here, although petitioners' suit is against private corporations alleged to have aided and abetted human rights abuses by the Government of Nigeria, adjudication of the suit would necessarily entail a determination about whether the Nigerian Government or its agents have transgressed limits imposed by international law.[4] Imposition of such liability would result from decisions of the Judiciary, which lacks the expertise of the political Branches to weigh the relevant considerations, and the jurisdiction of the courts would be invoked by private plaintiffs without "the check imposed by prosecutorial discretion," *Sosa*, 542 U.S. at 727, that the Executive can exercise in the criminal context.

Such ATS suits have often triggered foreign government protests.[5] The previous Government of Nigeria,

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[4] Respondents, moreover, are Dutch and British holding companies; the Nigerian subsidiary was dismissed from the suit for lack of personal jurisdiction. See Pet. App. A169-A170 (Leval, J., concurring only in the judgment). Recognition of a cause of action here could therefore require a U.S. court to opine on difficult questions of Dutch and British corporate law, including the availability and contours of veil-piercing liability, raising yet additional concerns. *E.g.*, *id.* at A181 n.55 (Leval, J., concurring only in the judgment).

[5] See, *e.g.*, Amici Br. of the Gov'ts of Australia & the United Kingdom, *Rio Tinto PLC* v. *Sarei*, No. 11-649; Amicus Br. of the Gov't of Canada, *Presbyterian Church* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); German Gov't View on the Balintulo v. Daimler AG Litigation, *Balintulo* v. *Daimler AG*, 09-2778 Docket entry (2d Cir. Oct. 13, 2009); Amici Br. of the Gov'ts of the Commonwealth of

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for example, lodged an objection with the Attorney General in 2002 about this case. See J.A. 128-131.[6] That potential for friction is augmented where, as here, the defendant is a national or corporation of a third country. The Governments of the United Kingdom and the Kingdom of the Netherlands filed an amicus brief in this Court objecting to the "overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged activities in foreign jurisdictions." Amici Br. 2. The "great caution" urged in *Sosa* counsels against recognizing a federal common-law cause of action that has the inherent potential to provoke the international friction the ATS was designed to prevent.[7]

Australia, the Swiss Confederation, and the United Kingdom, *Sosa*, *supra* (No. 03-339); Amicus Br. of the Republic of South Africa, *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (No. 05-2141), aff'd for lack of quorum *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008); see also U.S. Amicus Br. App. at 1a-14a, *Ntsebeza*, *supra* (No. 07-919) (attaching diplomatic notes from the Republic of South Africa, the Government of the United Kingdom, the Federal Republic of Germany, and the Government of Switzerland).

[6] This Office has been informed by the Department of State that the current Government of Nigeria has expressed no views on this case.

[7] Petitioners rely on the "transitory tort doctrine." See, *e.g.*, Pet. Supp. Br. 9, 19-20, 23, 27-31, 39. That doctrine is based in part on the theory that "[a] state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders," and courts have considered it to be "an expression of comity to give effect to the laws of the state where the wrong occurred." *Filartiga*, 630 F.2d at 885. Because "the only source of th[e] obligation is the law of the place of the act," however, it is that forum's "law [that] determines not merely the existence of the obligation, but equally determines its extent." *Slater* v. *Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904) (citation omitted). Thus, such cases would be heard, if at all, under the law of the foreign state.

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b. Foreign relations concerns similar to those raised by this sort of case may also arise in cases in which the actual individual perpetrator, not an alleged aider and abettor, is the defendant and present in the United States. But there are countervailing interests in that situation. In *Filartiga*, for example, one of the alien plaintiffs was in the United States when she learned that the individual allegedly responsible for torturing and killing her brother in Paraguay was living in New York. See 630 F.2d at 878-879.[8] The Executive Branch suggested in that case that "a refusal to recognize a private cause of action" could "seriously damage the credibility of our nation's commitment to the protection of human rights." U.S. Amicus Mem. at 22-23, *Filartiga*, *supra* (No. 79-6090).

This case is quite different from *Filartiga*. The United States could not be viewed as having harbored or otherwise provided refuge to an actual torturer or other "enemy of all mankind." *Filartiga*, 630 F.2d at 890; see *Senate Report* 3 (noting that TVPA would ensure that torturers "will no longer have a safe haven in the United States"). When an individual foreign perpetrator is

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This case involves the distinct question whether a cause of action should be recognized as a matter of federal common law—*i.e.*, under the substantive and remedial law of the United States.

[8] After selling his house in Paraguay, the defendant in *Filartiga* arrived in the United States under a visitor's visa in July 1978. He remained beyond the term of his visa and, when the victim's sister learned of his whereabouts, she contacted immigration authorities, which led to his arrest. The defendant was served with the civil complaint while being held pending deportation, the order of which was stayed during the district court proceedings. After the district court's decision dismissing the complaint on jurisdictional grounds, and after the plaintiffs' additional requests for a stay were denied, the defendant was deported. See *Filartiga*, 630 F.2d at 878-880.

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found residing in the United States, the perpetrator's ties to the U.S. are stronger and often more lasting, and the choice of forum and invocation of U.S. law by an alien residing in the United States may be entitled to more weight.[9] By contrast, respondents in this case are not exclusively present in the United States, even if they have sufficient contacts with the United States to establish personal jurisdiction. In such circumstances, other more appropriate means of redress would often be available in other forums, such as the principal place of business or country of incorporation. And if foreign nations with a more direct connection to the alleged offense or the alleged perpetrator choose not to provide a judicial remedy, the United States could not be faulted by the international community for declining to provide a remedy under U.S. law.

Congress, like the Executive Branch in *Filartiga*, concluded that U.S. interests would be served by allowing a private right of action to be brought for extraterritorial violations of the norm at issue in *Filartiga*. See *Senate Report* 3-5; see *House Report* 3-4. Faced with uncertainty as to whether victims like the Filartigas would be able to invoke the ATS in light of Judge Bork's concurring opinion in *Tel-Oren*, Congress created an express, but carefully circumscribed, cause of action available only against an individual for acts of torture or extrajudicial killing and only when acting under color of

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[9] The United States did not enter into widespread extradition treaties until the 1840s, and early American practice reflected an insular approach to fugitives. See Edward Clarke, *The Law of Extradition* 34-48 (4th ed. 1903). Indeed, in the famous Marbois incident, France had requested that De Longchamps be returned to France for punishment, but the Pennsylvania court refused. See *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111, 115-116 (Pa. Oyer & Terminer 1784).

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foreign law. See TVPA § 2(a), 106 Stat. 73; *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1706 (2012) (holding that the TVPA authorizes suit only against natural persons).

Today, the Filartigas would have a cause of action under the TVPA. Petitioners, however, would not. In this sensitive context, courts engaged in judicial lawmaking should not recognize a cause of action that is significantly more expansive in this respect than the express extraterritorial cause of action created by Congress. The courts therefore should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct.[10] The Court need not decide whether a cause of action should be created in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas.[11]

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[10] The question whether a cause of action should be recognized against respondents based on the aiding-and-abetting theory petitioners advance in this case raises additional questions. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The aiding-and-abetting issue was briefed below, see U.S. Initial Amicus Br. 2-3, 13 n.6, and was addressed in the government's amicus brief in *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919). Because the Court's supplemental question presented did not invite briefing on that issue, the United States has not addressed aiding-and-abetting liability here.

[11] The United States in recent years has advanced a more categorical rule against extraterritoriality before this Court and the courts of appeals. See, *e.g.*, U.S. *Sosa* Br. at 46-50 (arguing that no cause of action may be recognized under the ATS for the conduct of foreign persons in

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C. Exhaustion And Related Doctrines Should Apply With Special Force In Any ATS Action Involving Extraterritorial Conduct

If a federal common-law cause of action is created under the ATS for extraterritorial violations of the law of nations in certain circumstances, doctrines such as exhaustion and forum non conveniens should be applied at the outset of the litigation and with special force. Particularly where the nexus to the United States is slight, a U.S. court applying U.S. law should be a forum of last resort, if available at all.

1. In *Sosa*, the Court noted the possibility that ATS plaintiffs should be required to first exhaust "any remedies available in the domestic legal system, and perhaps in other forums," and stated that it "would certainly consider [such a] requirement in an appropriate case." 542 U.S. at 733 n.21. A suit brought by Nigerian plaintiffs against Dutch and British corporations based on the actions of Nigerian military and police forces in Nigeria is an appropriate case in which to adopt a mandatory exhaustion requirement.

By affording foreign states the opportunity to adjudicate claims arising within their jurisdiction (or involving their nationals), exhaustion demonstrates respect for foreign sovereigns and furthers the ATS's predominant purpose of avoiding international friction. Exhaustion may also mitigate (though not fully alleviate) the potential "adverse foreign policy consequences" inherent in

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foreign countries); U.S. Amicus Br. at 5-12, *Presbyterian Church* v. *Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) (arguing that no cause of action may be recognized under the ATS for conduct occurring in a foreign country). As explained in this brief, the government urges the Court not to adopt such a categorical rule here.

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having a U.S. court determine whether "a foreign government or its agent has transgressed" limits "on the power of [that] foreign government[] over [its] own citizens." *Sosa*, 542 U.S. at 727-728.

Notably, when Congress has acted to provide an express private right of action for international law violations, it has required exhaustion as a prerequisite to suit. The TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA § 2(b), 106 Stat. 73. The legislative history explains that exhaustion will "ensure[] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." *House Report* 5. Given the practical consequences of allowing a suit based on extraterritorial conduct to proceed, and in light of the great caution urged in *Sosa*, this Court should impose an exhaustion requirement in ATS cases that is at least as stringent as the one provided by Congress in the TVPA.[12]

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[12] A plurality of the en banc Ninth Circuit has rejected a mandatory exhaustion requirement in favor of the application of prudential exhaustion principles on a case-by-case basis. See *Sarei* v. *Rio Tinto, PLC*, 550 F.3d 822, 827-828 & n.4 (2008); cf. *id.* at 833 (Bea, J., concurring) (arguing in favor of a mandatory exhaustion requirement). Other courts of appeals have declined to require any exhaustion of local remedies. See *Jean* v. *Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005); cf. *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011) (rejecting exhaustion requirement as "ridiculous," but suggesting that some form of abstention based on comity concerns might be appro-

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2. Other doctrines, such as forum non conveniens, should also be applied with special vigor in ATS cases. If the parties and the conduct have little connection to the United States, and an adequate alternative forum exists, courts should presumptively dismiss.

The doctrine of forum non conveniens requires an examination of whether an alternative forum exists and, if so, a weighing of private and public interest factors to determine whether dismissal is appropriate. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 n.6, 254 n.22 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947). In other settings, courts apply a strong presumption in favor of a resident plaintiff's choice of forum. *Piper Aircraft*, 454 U.S. at 255-256; *id.* at 256 (non-resident "foreign plaintiff's choice [of forum] deserves less deference"). And some courts have treated the doctrine as "an exceptional tool," *Dole Food Co.* v. *Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002) (internal quotation marks and citation omitted), to be used only in "rare instances," *Carey* v. *Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004) (internal quotation marks and citation omitted).

In the ATS context, however, dismissal on forum non conveniens grounds should not be the rare exception. For the same reasons that plaintiffs should be required to exhaust all available local remedies (*i.e.*, the potential for international discord and the respect for foreign tribunals), courts should not look at forum non conveniens arguments with a skeptical eye. Rather, they should first determine whether an alternative and adequate forum exists. *Piper Aircraft*, 454 U.S. at 254 n.22. That

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priate). Accordingly, the Court should make clear that exhaustion is mandatory in every case unless futile.

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requirement is ordinarily satisfied "when the defendant is 'amenable to process' in the other jurisdiction," *ibid.* (quoting *Gilbert*, 330 U.S. at 506-507), and only in "rare circumstances" would a remedy afforded by a foreign forum be so "clearly unsatisfactory" that it could be declared inadequate, *ibid.* For reasons of comity among nations, in suits based on the ATS, assertions that a foreign judicial system is inadequate should not be accepted absent a very clear and persuasive showing. Cf. *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008).

If there is an alternative forum, the court should then weigh the relevant private and public interests. But, in the ATS context, courts should not apply a strong presumption in favor of a resident alien's choice of forum, and defendants should not have to demonstrate that the public and private interest factors "tilt[] strongly in favor of trial in the foreign forum," *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) (brackets in original; internal quotation marks and citation omitted), cert. denied, 532 U.S. 941 (2001).[13] A

[13] In *Wiwa*, the Second Circuit reversed the district court's dismissal on forum non conveniens grounds in a case involving the same defendants and nearly identical facts as this case. See 226 F.3d at 92-93, 107; Pet. Supp. Br. 4 n.3, 56 n.47. The district court dismissed the action after concluding that Great Britain provided an adequate alternative forum and weighing the private and public interests. *Wiwa*, 226 F.3d at 92, 94. The court of appeals assumed that British courts provided an adequate alternative forum, but reversed after concluding that the public and private interest factors did not "tilt sufficiently strongly in favor of trial in the foreign forum." *Id.* at 101. That decision is flawed in at least two respects. First, in this context, the court afforded considerably too much deference to the plaintiffs' choice of forum. See *id.* at 101-103. Second, the court erroneously concluded that the TVPA expresses a policy in favor of entertaining ATS suits for torture in U.S. courts. See *id.* at 103-106.

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more flexible application of forum non conveniens analysis that gives effect when possible to substantial interests of other sovereigns in adjudicating disputes over incidents occurring in their own territory, or involving their own nationals outside the United States, would help to mitigate the potential for international friction arising from the recognition of an extraterritorial cause of action based on the ATS.

3. The two doctrines highlighted above are not exhaustive. Personal jurisdiction over the defendant must be established. International comity, act of state, political question, "case-specific deference" (*Sosa*, 542 U.S. at 733 n.21), and other doctrines should also be applied, with reference to the special considerations just identified, whenever appropriate.

While there may be some overlap, the doctrines are also not mutually exclusive. If, for example, exhaustion of local remedies is considered futile because the place where the conduct occurred does not provide an adequate remedy, dismissal may still be warranted on forum non conveniens grounds because the place where the perpetrator resides does. Or, if a forum non conveniens dismissal is deemed inappropriate based on a balancing of private and public interests, mandatory exhaustion of local remedies may still be required. Courts should apply these doctrines at the outset of litigation, and in as expeditious a manner as possible, to ensure that foreign defendants are not subject to protracted legal proceedings in cases that are better litigated abroad.

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CONCLUSION

Insofar as the Court addresses the recognition of a federal cause of action under the ATS based on actions occurring within the territory of a foreign sovereign, the judgment of the court of appeals should be affirmed. Insofar as the Court addresses whether a corporation can be a proper defendant in a suit under the ATS, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2012

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3 FÉVRIER 2012

ARRÊT

IMMUNITÉS JURIDICTIONNELLES DE L'ÉTAT (ALLEMAGNE c. ITALIE ; GRÈCE (INTERVENANT))

JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY *v.* ITALY: GREECE INTERVENING)

3 FEBRUARY 2012

JUDGMENT

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JUDGMENT

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Judge* ad hoc GAJA; *Registrar* COUVREUR.

In the case concerning jurisdictional immunities of the State,

between

the Federal Republic of Germany,

represented by

H.E. Ms Susanne Wasum-Rainer, Ambassador, Director-General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Heinz-Peter Behr, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

Mr. Christian Tomuschat, former Member and Chairman of the International Law Commission, Professor emeritus of Public International Law at the Humboldt University of Berlin,

as Agents;

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Mr. Andrea Gattini, Professor of Public International Law at the University of Padua,

Mr. Robert Kolb, Professor of Public International Law at the University of Geneva,

as Counsel and Advocates;

Mr. Guido Hildner, Head of the Public International Law Division, Federal Foreign Office,

Mr. Götz Schmidt-Bremme, Head of the International Civil, Trade and Tax Law Division, Federal Foreign Office,

Mr. Felix Neumann, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Mr. Gregor Schotten, Federal Foreign Office,

Mr. Klaus Keller, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Ms Susanne Achilles, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Ms Donate Arz von Straussenburg, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

as Advisers;

Ms Fiona Kaltenborn,

as Assistant,

and

the Italian Republic,

represented by

H.E. Mr. Paolo Pucci di Benisichi, Ambassador and State Counsellor,

as Agent;

Mr. Giacomo Aiello, State Advocate,

H.E. Mr. Franco Giordano, Ambassador of the Italian Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Luigi Condorelli, Professor of International Law, University of Florence,

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Mr. Pierre-Marie Dupuy, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, and University of Paris II (Panthéon-Assas),

Mr. Paolo Palchetti, Associate Professor of International Law, University of Macerata,

Mr. Salvatore Zappalà, Professor of International Law, University of Catania, Legal Adviser, Permanent Mission of Italy to the United Nations,

as Counsel and Advocates;

Mr. Giorgio Marrapodi, Minister Plenipotentiary, Head of the Service for Legal Affairs, Ministry of Foreign Affairs,

Mr. Guido Cerboni, Minister Plenipotentiary, Co-ordinator for the countries of Central and Western Europe, Directorate-General for the European Union, Ministry of Foreign Affairs,

Mr. Roberto Bellelli, Legal Adviser, Embassy of Italy in the Kingdom of the Netherlands,

Ms Sarah Negro, First Secretary, Embassy of Italy in the Kingdom of the Netherlands,

Mr. Mel Marquis, Professor of Law, European University Institute, Florence,

Ms Francesca De Vittor, International Law Researcher, University of Macerata,

as Advisers,

with, as State permitted to intervene in the case,

the Hellenic Republic,

represented by

Mr. Stelios Perrakis, Professor of International and European Institutions, Panteion University of Athens,

as Agent;

H.E. Mr. Ioannis Economides, Ambassador of the Hellenic Republic to the Kingdom of the Netherlands,

as Deputy-Agent;

Mr. Antonis Bredimas, Professor of International Law, National and Kapodistrian University of Athens,

as Counsel and Advocate;

Ms Maria-Daniella Marouda, Lecturer in International Law, Panteion University of Athens,

as Counsel,

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THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 23 December 2008, the Federal Republic of Germany (hereinafter "Germany") filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter "Italy") in respect of a dispute originating in "violations of obligations under international law" allegedly committed by Italy through its judicial practice "in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law".

As a basis for the jurisdiction of the Court, Germany, in its Application, invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

2. Under Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Italy; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of Italian nationality, Italy exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Giorgio Gaja.

4. By an Order of 29 April 2009, the Court fixed 23 June 2009 as the time-limit for the filing of the Memorial of Germany and 23 December 2009 as the time-limit for the filing of the Counter-Memorial of Italy; those pleadings were duly filed within the time-limits so prescribed. The Counter-Memorial of Italy included a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich".

5. By an Order of 6 July 2010, the Court decided that the counter-claim presented by Italy was inadmissible as such under Article 80, paragraph 1, of the Rules of Court. By the same Order, the Court authorized Germany to submit a Reply and Italy to submit a Rejoinder, and fixed 14 October 2010 and 14 January 2011 respectively as the time-limits for the filing of those pleadings; those pleadings were duly filed within the time-limits so prescribed.

6. On 13 January 2011, the Hellenic Republic (hereinafter "Greece") filed in the Registry an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In its Application, Greece indicated that it "[did] not seek to become a party to the case".

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7. In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 13 January 2011, transmitted certified copies of the Application for permission to intervene to the Government of Germany and the Government of Italy, which were informed that the Court had fixed 1 April 2011 as the time-limit for the submission of their written observations on that Application. The Registrar also transmitted, under paragraph 2 of the same Article, a copy of the Application to the Secretary-General of the United Nations.

8. Germany and Italy each submitted written observations on Greece's Application for permission to intervene within the time-limit thus fixed. The Registry transmitted to each Party a copy of the other's observations, and copies of the observations of both Parties to Greece.

9. In light of Article 84, paragraph 2, of the Rules of Court, and taking into account the fact that neither Party filed an objection, the Court decided that it was not necessary to hold hearings on the question whether Greece's Application for permission to intervene should be granted. The Court nevertheless decided that Greece should be given an opportunity to comment on the observations of the Parties and that the latter should be allowed to submit additional written observations on the question. The Court fixed 6 May 2011 as the time-limit for the submission by Greece of its own written observations on those of the Parties, and 6 June 2011 as the time-limit for the submission by the Parties of additional observations on Greece's written observations. The observations of Greece and the additional observations of the Parties were submitted within the time-limits thus fixed. The Registry duly transmitted to the Parties a copy of the observations of Greece; it transmitted to each of the Parties a copy of the other's additional observations and to Greece copies of the additional observations of both Parties.

10. By an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy. The Court further fixed the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court: 5 August 2011 for the written statement of Greece and 5 September 2011 for the written observations of Germany and Italy on that statement.

11. The written statement of Greece and the written observations of Germany were duly filed within the time-limits so fixed. By a letter dated I September 2011, the Agent of Italy indicated that the Italian Republic would not be presenting observations on the written statement of Greece at that stage of the proceedings, but reserved "its position and right to address certain points raised in the written statement, as necessary, in the course of the oral proceedings". The Registry duly transmitted to the Parties a copy of the written statement of Greece; it transmitted to Italy and Greece a copy of the written observations of Germany.

12. Under Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings. After consulting the Parties and Greece, the Court decided that the same should apply to the written statement of the intervening State and the written observations of Germany on that statement.

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13. Public hearings were held from 12 to 16 September 2011, at which the Court heard the oral arguments and replies of:

For Germany: Ms Susanne Wasum-Rainer,
Mr. Christian Tomuschat,
Mr. Andrea Gattini,
Mr. Robert Kolb.

For Italy: Mr. Giacomo Aiello,
Mr. Luigi Condorelli,
Mr. Salvatore Zappalà,
Mr. Paolo Palchetti,
Mr. Pierre-Marie Dupuy.

For Greece: Mr. Stelios Perrakis,
Mr. Antonis Bredimas.

14. At the hearings questions were put by Members of the Court to the Parties and to Greece, as intervening State, to which replies were given in writing. The Parties submitted written comments on those written replies.

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15. In its Application, Germany made the following requests:

"Germany prays the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

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Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

16. In the course of the written proceedings the following submissions were presented by the Parties:

On behalf of the Government of Germany,

in the Memorial and in the Reply:

"Germany prays the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

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(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above";

On behalf of the Government of Italy,

in the Counter-Memorial and in the Rejoinder:

"On the basis of the facts and arguments set out [in Italy's Counter-Memorial and Rejoinder], and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected."

17. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

"Germany respectfully requests the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany respectfully requests the Court to adjudge and declare that:

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable; and

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

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On behalf of the Government of Italy,

> "[F]or the reasons given in [its] written and oral pleadings, [Italy requests] that the Court adjudge and hold the claims of the Applicant to be unfounded. This request is subject to the qualification that . . . Italy has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled."

*

18. At the end of the written statement submitted by it in accordance with Article 85, paragraph 1, of the Rules of Court, Greece stated *inter alia*:

> "that the effect of the judgment that the ICJ will hand down in this case concerning the jurisdictional immunity of the State will be of major importance to the Italian legal order and certainly to the Greek legal order.
>
> . . . . . .
>
> Further, an ICJ decision on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts in this regard. It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts."

19. At the end of the oral observations submitted by it with respect to the subject-matter of the intervention in accordance with Article 85, paragraph 3, of the Rules of Court, Greece stated *inter alia*:

> "A decision of the International Court of Justice on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts . . . It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.
>
> . . . . . .
>
> The Greek Government considers that the effect of the judgment that [the] Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order."

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I. HISTORICAL AND FACTUAL BACKGROUND

20. The Court finds it useful at the outset to describe briefly the historical and factual background of the case which is largely uncontested between the Parties.

21. In June 1940, Italy entered the Second World War as an ally of the German Reich. In September 1943, following the removal of Mussolini from power, Italy surrendered to the Allies and, the following month, declared war on Germany. German forces, however, occupied much of Italian territory and, between October 1943 and the end of the War, perpetrated many atrocities against the population of that territory, including massacres of civilians and the deportation of large numbers of civilians for use as forced labour. In addition, German forces took prisoner, both inside Italy and elsewhere in Europe, several hundred thousand members of the Italian armed forces. Most of these prisoners (hereinafter the "Italian military internees") were denied the status of prisoner of war and deported to Germany and German-occupied territories for use as forced labour.

1. The Peace Treaty of 1947

22. On 10 February 1947, in the aftermath of the Second World War, the Allied Powers concluded a Peace Treaty with Italy, regulating, in particular, the legal and economic consequences of the war with Italy. Article 77 of the Peace Treaty reads as follows:

> "1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.
>
> 2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution.
>
> 3. The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.
>
> 4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war."

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2. The Federal Compensation Law of 1953

23. In 1953, the Federal Republic of Germany adopted the Federal Compensation Law Concerning Victims of National Socialist Persecution (*Bundesentschädigungsgesetz* (BEG)) in order to compensate certain categories of victims of Nazi persecution. Many claims by Italian nationals under the Federal Compensation Law were unsuccessful, either because the claimants were not considered victims of national Socialist persecution within the definition of the Federal Compensation Law, or because they had no domicile or permanent residence in Germany, as required by that Law. The Federal Compensation Law was amended in 1965 to cover claims by persons persecuted because of their nationality or their membership in a non-German ethnic group, while requiring that the persons in question had refugee status on 1 October 1953. Even after the Law was amended in 1965, many Italian claimants still did not qualify for compensation because they did not have refugee status on 1 October 1953. Because of the specific terms of the Federal Compensation Law as originally adopted and as amended in 1965, claims brought by victims having foreign nationality were generally dismissed by the German courts.

3. The 1961 Agreements

24. On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy. The first Agreement, which entered into force on 16 September 1963, concerned the "Settlement of certain property-related, economic and financial questions". Under Article 1 of that Agreement, Germany paid compensation to Italy for "outstanding questions of an economic nature". Article 2 of the Agreement provided as follows:

> "(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.
>
> (2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the abovementioned claims."

25. The second Agreement, which entered into force on 31 July 1963, concerned "Compensation for Italian nationals subjected to National-Socialist measures of persecution". By virtue of this Agreement, the Federal Republic of Germany undertook to pay compensation to Italian nationals affected by those measures. Under Article 1 of that Agreement, Germany agreed to pay Italy forty million Deutsche marks

> "for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures".

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Article 3 of that Agreement provided as follows:

> "Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty."

4. Law establishing the "Remembrance, Responsibility and Future" Foundation

26. On 2 August 2000, a Federal Law was adopted in Germany, establishing a "Remembrance, Responsibility and Future" Foundation (hereinafter the "2000 Federal Law") to make funds available to individuals who had been subjected to forced labour and "other injustices from the National Socialist period" (Sec. 2, para. 1). The Foundation did not provide money directly to eligible individuals under the 2000 Federal Law but instead to "partner organizations", including the International Organization for Migration in Geneva. Article 11 of the 2000 Federal Law placed certain limits on entitlement to compensation. One effect of this provision was to exclude from the right to compensation those who had had the status of prisoner of war, unless they had been detained in concentration camps or came within other specified categories. The reason given in the official commentary to this provision, which accompanied the draft Law, was that prisoners of war "may, according to the rules of international law, be put to work by the detaining power" *[translation by the Registry]* (*Bundestagsdrucksache* 14/3206, 13 April 2000).

Thousands of former Italian military internees, who, as noted above, had been denied the status of prisoner of war by the German Reich (see paragraph 21), applied for compensation under the 2000 Federal Law. In 2001, the German authorities took the view that, under the rules of international law, the German Reich had not been able unilaterally to change the status of the Italian military internees from prisoners of war to that of civilian workers. Therefore, according to the German authorities, the Italian military internees had never lost their prisoner-of-war status, with the result that they were excluded from the benefits provided under the 2000 Federal Law. On this basis, an overwhelming majority of requests for compensation lodged by Italian military internees was rejected. Attempts by former Italian military internees to challenge that decision and seek redress in the German courts were unsuccessful. In a number of decisions, German courts ruled that the individuals in question were not entitled to compensation under the 2000 Federal Law because they had been prisoners of war. On 28 June 2004, a Chamber of the German Constitutional Court *(Bundesverfassungsgericht)* held that Article 11, paragraph 3, of the 2000 Federal Law, which excluded reparation for prisoners of war, did not violate the right to equality before the law guaranteed by the German Constitution, and that public international law did not establish an individual right to compensation for forced labour.

A group of former Italian military internees filed an application against Germany before the European Court of Human Rights on 20 December 2004. On 4 September 2007, a Chamber of that Court declared that the application was "incompatible *ratione materiae*" with the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and its protocols and therefore was declared inadmissible (*Associazione Nazionale Reduci and 275 others* v. *Germany*, decision of 4 September 2007, Application No. 45563/04).

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5. Proceedings before Italian courts

A. Cases involving Italian nationals

27. On 23 September 1998, Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war, instituted proceedings against the Federal Republic of Germany in the Court of Arezzo *(Tribunale di Arezzo)* in Italy. On 3 November 2000, the Court of Arezzo decided that Mr. Luigi Ferrini's claim was inadmissible because Germany, as a sovereign State, was protected by jurisdictional immunity. By a judgment of 16 November 2001, registered on 14 January 2002, the Court of Appeal of Florence *(Corte di Appello di Firenze)* dismissed the appeal of the claimant on the same grounds. On 11 March 2004, the Italian Court of Cassation *(Corte di Cassazione)* held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime (*Ferrini* v. *Federal Republic of Germany*, Decision No. 5044/2004 (*Rivista di diritto internazionale*, Vol. 87, 2004, p. 539; *International Law Reports (ILR)*, Vol. 128, p. 658)). The case was then referred back to the Court of Arezzo, which held in a judgment dated 12 April 2007 that, although it had jurisdiction to entertain the case, the claim to reparation was time-barred. The judgment of the Court of Arezzo was reversed on appeal by the Court of Appeal of Florence, which held in a judgment dated 17 February 2011 that Germany should pay damages to Mr. Luigi Ferrini as well as his case-related legal costs incurred in the course of the judicial proceedings in Italy. In particular, the Court of Appeal of Florence held that jurisdictional immunity is not absolute and cannot be invoked by a State in the face of acts by that State which constitute crimes under international law.

28. Following the *Ferrini* Judgment of the Italian Court of Cassation dated 11 March 2004, twelve claimants brought proceedings against Germany in the Court of Turin *(Tribunale di Torino)* on 13 April 2004 in the case concerning *Giovanni Mantelli and others*. On 28 April 2004, Liberato Maietta filed a case against Germany before the Court of Sciacca *(Tribunale di Sciacca)*. In both cases, which relate to acts of deportation to, and forced labour in, Germany which took place between 1943 and 1945, an interlocutory appeal requesting a declaration of lack of jurisdiction ("regolamento preventivo di giurisdizione") was filed by Germany before the Italian Court of Cassation. By two Orders of 29 May 2008 issued in the *Giovanni Mantelli and others* and the *Liberato Maietta* cases (Italian Court of Cassation, Order No. 14201 (Mantelli) *Foro italiano*, Vol. 134, 2009, I, p. 1568); Order No. 14209 (Maietta) *Rivista di diritto internazionale*, Vol. 91, 2008, p. 896), the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany. A number of similar claims against Germany are currently pending before Italian courts.

29. The Italian Court of Cassation also confirmed the reasoning of the *Ferrini* Judgment in a different context in proceedings brought against Mr. Max Josef Milde, a member of the "Hermann Göring" division of the German armed forces, who was charged with participation in massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio in Italy. The Military Court of La Spezia *(Tribunale Militare di La Spezia)* sentenced Mr. Milde *in absentia* to life imprisonment and ordered Mr. Milde and Germany, jointly and severally, to pay reparation to the successors in title of the victims of the massacre who appeared as civil parties in the proceedings (judgment of 10 October 2006 (registered on 2 February 2007)). Germany appealed to

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the Military Court of Appeals in Rome *(Corte Militare di Appello di Roma)* against that part of the decision, which condemned it. On 18 December 2007 the Military Court of Appeals dismissed the appeal. In a judgment of 21 October 2008 (registered on 13 January 2009), the Italian Court of Cassation rejected Germany's argument of lack of jurisdiction and confirmed its reasoning in the *Ferrini* Judgment that in cases of crimes under international law, the jurisdictional immunity of States should be set aside (*Rivista di diritto internazionale*, Vol. 92, 2009, p. 618).

B. Cases involving Greek nationals

30. On 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, involving many civilians. In 1995, relatives of the victims of the massacre who claimed compensation for loss of life and property commenced proceedings against Germany. The Greek Court of First Instance *(Protodikeio)* of Livadia rendered a judgment in default on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to the successors in title of the victims of the massacre. Germany's appeal of that judgment was dismissed by the Hellenic Supreme Court (*Areios Pagos*) on 4 May 2000 (*Prefecture of Voiotia* v. *Federal Republic of Germany*, case No. 11/2000 (*ILR*, Vol. 129, p. 513) (the *Distomo* case)). Article 923 of the Greek Code of Civil Procedure requires authorization from the Minister for Justice to enforce a judgment against a foreign State in Greece. That authorization was requested by the claimants in the *Distomo* case but was not granted. As a result, the judgments against Germany have remained unexecuted in Greece.

31. The claimants in the *Distomo* case brought proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to that Convention by refusing to comply with the decision of the Court of First Instance of Livadia dated 25 September 1997 (as to Germany) and failing to permit execution of that decision (as to Greece). In its decision of 12 December 2002, the European Court of Human Rights, referring to the rule of State immunity, held that the claimants' application was inadmissible (*Kalogeropoulou and others* v. *Greece and Germany*, Application No. 59021/00, Decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537).

32. The Greek claimants brought proceedings before the German courts in order to enforce in Germany the judgment rendered on 25 September 1997 by the Greek Court of First Instance of Livadia, as confirmed on 4 May 2000 by the Hellenic Supreme Court. In its judgment of 26 June 2003, the German Federal Supreme Court *(Bundesgerichtshof)* held that those Greek judicial decisions could not be recognized within the German legal order because they had been given in breach of Germany's entitlement to State immunity (*Greek citizens* v. *Federal Republic of Germany*, case No. III ZR 245/98, *Neue Juristische Wochenschrift (NJW)*, 2003, p. 3488; *ILR*, Vol. 129, p. 556).

33. The Greek claimants then sought to enforce the judgments of the Greek courts in the *Distomo* case in Italy. The Court of Appeal of Florence held in a decision dated 2 May 2005 (registered on 5 May 2005) that the order contained in the judgment of the Hellenic Supreme

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Court, imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings before that Court, was enforceable in Italy. In a decision dated 6 February 2007 (registered on 22 March 2007), the Court of Appeal of Florence rejected the objection raised by Germany against the decision of 2 May 2005 (*Foro italiano*, Vol. 133, 2008, I, p. 1308). The Italian Court of Cassation, in a judgment dated 6 May 2008 (registered on 29 May 2008), confirmed the ruling of the Court of Appeal of Florence (*Rivista di diritto internazionale*, Vol. 92, 2009, p. 594).

34. Concerning the question of reparations to be paid to Greek claimants by Germany, the Court of Appeal of Florence declared, by a decision dated 13 June 2006 (registered on 16 June 2006), that the judgment of the Court of First Instance of Livadia dated 25 September 1997 was enforceable in Italy. In a judgment dated 21 October 2008 (registered on 25 November 2008), the Court of Appeal of Florence rejected the objection by the German Government against the decision of 13 June 2006. The Italian Court of Cassation, in a judgment dated 12 January 2011 (registered on 20 May 2011), confirmed the ruling of the Court of Appeal of Florence.

35. On 7 June 2007, the Greek claimants, pursuant to the decision by the Court of Appeal of Florence of 13 June 2006, registered with the Como provincial office of the Italian Land Registry *(Agenzia del Territorio)* a legal charge *(ipoteca giudiziale)* over Villa Vigoni, a property of the German State near Lake Como. The State Legal Service for the District of Milan *(Avvocatura Distrettuale dello Stato di Milano)*, in a submission dated 6 June 2008 and made before the Court of Como *(Tribunale di Como)*, maintained that the charge should be cancelled. Under Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the legal charge was suspended pending the decision of the International Court of Justice in the present case.

36. Following the institution of proceedings in the *Distomo* case in 1995, another case was brought against Germany by Greek nationals before Greek courts — referred to as the *Margellos* case — involving claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944. In 2001, the Hellenic Supreme Court referred that case to the Special Supreme Court *(Anotato Eidiko Dikastirio)*, which, in accordance with Article 100 of the Constitution of Greece, has jurisdiction in relation to "the settlement of controversies regarding the determination of generally recognized rules of international law" *[translation by the Registry]*, requesting it to decide whether the rules on State immunity covered acts referred to in the *Margellos* case. By a decision of 17 September 2002, the Special Supreme Court found that, in the present state of development of international law, Germany was entitled to State immunity (*Margellos* v. *Federal Republic of Germany*, case No. 6/2002, *ILR*, Vol. 129, p. 525).

II. THE SUBJECT-MATTER OF THE DISPUTE AND THE JURISDICTION OF THE COURT

37. The submissions presented to the Court by Germany have remained unchanged throughout the proceedings (see paragraphs 15, 16 and 17 above).

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War;

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that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts. Consequently, the Applicant requests the Court to declare that Italy's international responsibility is engaged and to order the Respondent to take various steps by way of reparation.

38. Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end.

In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich"; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court (see paragraph 5 above).

*

39. The subject-matter of a dispute brought before the Court is delimited by the claims submitted to it by the parties. In the present case, since there is no longer any counter-claim before the Court and Italy has requested the Court to "adjudge Germany's claims to be unfounded", it is those claims that delimit the subject-matter of the dispute which the Court is called upon to settle. It is in respect of those claims that the Court must determine whether it has jurisdiction to entertain the case.

40. Italy has raised no objection of any kind regarding the jurisdiction of the Court or the admissibility of the Application.

Nevertheless, according to well-established jurisprudence, the Court "must . . . always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13).

41. Germany's Application was filed on the basis of the jurisdiction conferred on the Court by Article 1 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

> "The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

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(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

42. Article 27, subparagraph *(a)*, of the same Convention limits the scope of that instrument *ratione temporis* by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". The Convention entered into force as between Germany and Italy on 18 April 1961.

43. The claims submitted to the Court by Germany certainly relate to "international legal disputes" within the meaning of Article 1 as cited above, between two States which, as has just been said, were both parties to the Convention on the date when the Application was filed, and indeed continue to be so.

44. The clause in the above-mentioned Article 27 imposing a limitation *ratione temporis* is not applicable to Germany's claims: the dispute which those claims concern does not "relat[e] to facts or situations prior to the entry into force of th[e] Convention as between the parties to the dispute", i.e., prior to 18 April 1961. The "facts or situations" which have given rise to the dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity which it claimed, and by measures of constraint applied to property belonging to Germany. Those decisions and measures were adopted between 2004 and 2011, thus well after the European Convention for the Peaceful Settlement of Disputes entered into force as between the Parties. It is true that the subject-matter of the disputes to which the judicial proceedings in question relate is reparation for the injury caused by actions of the German armed forces in 1943-1945. Germany's complaint before the Court, however, is not about the treatment of that subject-matter in the judgments of the Italian courts; its complaint is solely that its immunities from jurisdiction and enforcement have been violated. Defined in such terms, the dispute undoubtedly relates to "facts or situations" occurring entirely after the entry into force of the Convention as between the Parties. Italy has thus rightly not sought to argue that the dispute brought before the Court by Germany falls wholly or partly within the limitation *ratione temporis* under the above-mentioned Article 27. The Court has jurisdiction to deal with the dispute.

45. The Parties, who have not disagreed on the analysis set out above, have on the other hand debated the extent of the Court's jurisdiction in a quite different context, that of some of the arguments put forward by Italy in its defence and relating to the alleged non-performance by Germany of its obligation to make reparation to the Italian and Greek victims of the crimes committed by the German Reich in 1943-1945.

According to Italy, a link exists between the question of Germany's performance of its obligation to make reparation to the victims and that of the jurisdictional immunity which Germany might rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the reparation to which they may be entitled, would be deprived of the right to invoke its jurisdictional immunity before the courts of the State of the victims' nationality.

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46. Germany has contended that the Court could not rule on such an argument, on the basis that it concerned the question of reparation claims, which relate to facts prior to 18 April 1961. According to Germany, "facts occurring before the date of the entry into force of the European Convention for the Peaceful Settlement of Disputes as between Italy and Germany clearly lie outside the jurisdiction of the Court", and "reparation claims do not fall within the subject-matter of the present dispute and do not form part of the present proceedings". Germany relies in this respect on the Order whereby the Court dismissed Italy's counter-claim, which precisely asked the Court to find that Germany had violated its obligation of reparation owed to Italian victims of war crimes and crimes against humanity committed by the German Reich (see paragraph 38). Germany points out that this dismissal was based on the fact that the said counter-claim fell outside the jurisdiction of the Court, because of the clause imposing a limitation *ratione temporis* in the above-mentioned Article 27 of the European Convention for the Peaceful Settlement of Disputes, the question of reparation claims resulting directly from the acts committed in 1943-1945.

47. Italy has responded to this objection that, while the Order of 6 July 2010 certainly prevents it from pursuing its counter-claim in the present case, it does not on the other hand prevent it from using the arguments on which it based that counter-claim in its defence against Germany's claims; that the question of the lack of appropriate reparation is, in its view, crucial for resolving the dispute over immunity; and that the Court's jurisdiction to take cognizance of it incidentally is thus indisputable.

48. The Court notes that, since the dismissal of Italy's counter-claim, it no longer has before it any submissions asking it to rule on the question of whether Germany has a duty of reparation towards the Italian victims of the crimes committed by the German Reich and whether it has complied with that obligation in respect of all those victims, or only some of them. The Court is therefore not called upon to rule on those questions.

49. However, in support of its submission that it has not violated Germany's jurisdictional immunity, Italy contends that Germany stands deprived of the right to invoke that immunity in Italian courts before which civil actions have been brought by some of the victims, because of the fact that it has not fully complied with its duty of reparation.

50. The Court must determine whether, as Italy maintains, the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of that State's jurisdictional immunity before foreign courts. This question is one of law on which the Court must rule in order to determine the customary international law applicable in respect of State immunity for the purposes of the present case.

Should the preceding question be answered in the affirmative, the second question would be whether, in the specific circumstances of the case, taking account in particular of Germany's conduct on the issue of reparation, the Italian courts had sufficient grounds for setting aside Germany's immunity. It is not necessary for the Court to satisfy itself that it has jurisdiction to respond to this second question until it has responded to the first.

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The Court considers that, at this stage, no other question arises with regard to the existence or scope of its jurisdiction.

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51. The Court will first address the issues raised by Germany's first submission, namely whether, by exercising jurisdiction over Germany with regard to the claims brought before them by the various Italian claimants, the Italian courts acted in breach of Italy's obligation to accord jurisdictional immunity to Germany. It will then turn, in Section IV, to the measures of constraint adopted in respect of Villa Vigoni and, in Section V, to the decisions of the Italian courts declaring enforceable in Italy the judgments of the Greek courts.

III. ALLEGED VIOLATION OF GERMANY'S JURISDICTIONAL IMMUNITY IN THE PROCEEDINGS BROUGHT BY THE ITALIAN CLAIMANTS

1. The issues before the Court

52. The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. Germany has fully acknowledged the "untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees" (Joint Declaration of Germany and Italy, Trieste, 18 November 2008), accepts that these acts were unlawful and stated before this Court that it "is fully aware of [its] responsibility in this regard". The Court considers that the acts in question can only be described as displaying a complete disregard for the "elementary considerations of humanity" (*Corfu Channel (United Kingdom* v. *Albania), I.C.J. Reports 1949*, p. 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 112). One category of cases involved the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cornia and San Pancrazio by members of the "Hermann Göring" division of the German armed forces involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier (*Max Josef Milde* case, Military Court of La Spezia, judgment of 10 October 2006 (registered on 2 February 2007)). Another category involved members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany. The third concerned members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled and who were similarly used as forced labourers. The Court considers that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945. Article 6 *(b)* of the Charter of the International Military Tribunal, 8 August 1945 (United Nations, *Treaty Series (UNTS)*, Vol. 82, p. 279), convened at Nuremberg included as war crimes "murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory", as well as "murder or ill-treatment of prisoners of war". The list of crimes against humanity in Article 6 *(c)* of the Charter included

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"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war". The murder of civilian hostages in Italy was one of the counts on which a number of war crimes defendants were condemned in trials immediately after the Second World War (e.g., *Von Mackensen and Maelzer* (1946) *Annual Digest*, Vol. 13, p. 258; *Kesselring* (1947) *Annual Digest*, Vol. 13, p. 260; and *Kappler* (1948) *Annual Digest*, Vol. 15, p. 471). The principles of the Nuremberg Charter were confirmed by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity.

54. As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 (*European Treaty Series (ETS)*, No. 74; *UNTS*, Vol. 1495, p. 182) (hereinafter the "European Convention"), Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted on 2 December 2004 (hereinafter the "United Nations Convention"), which is not yet in force in any event. As of 1 February 2012, the United Nations Convention had been signed by 28 States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument. Neither Germany nor Italy has signed the Convention.

55. It follows that the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of "international custom, as evidence of a general practice accepted as law" conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969*, p. 44, para. 77). Moreover, as the Court has also observed,

> "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27.)

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In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States" (*Yearbook of the International Law Commission*, 1980, Vol. II (2), p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

58. The Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. They differ, however, as to whether (as Germany contends) the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or (as Italy maintains) that which applied at the time the proceedings themselves occurred. The Court observes that, in accordance with the principle stated in Article 13 of the

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International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph 52 — occurred in 1943-1945, and it is, therefore, the international law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the international law in force at the time of those proceedings which the Court has to apply. Moreover, as the Court has stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (*Arrest Warrant (Democratic Republic of Congo* v. *Belgium), I.C.J. Reports 2002*, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945.

59. The Parties also differ as to the scope and extent of the rule of State immunity. In that context, the Court notes that many States (including both Germany and Italy) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*. That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American Juridical Committee of the Organization of American States in 1983 (*ILM*, Vol. 22, p. 292)).

60. The Court is not called upon to address the question of how international law treats the issue of State immunity in respect of *acta jure gestionis*. The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*. The Court notes that Italy, in response to a question posed by a member of the Court, recognized that those acts had to be characterized as *acta jure imperii*, notwithstanding that they were unlawful. The Court considers that the terms *"jure imperii"* and *"jure gestionis"* do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power *(jus imperii)* or the law concerning non-sovereign activities of a State, especially private and commercial activities *(jus gestionis)*. To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as *acta jure imperii*.

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61. Both Parties agree that States are generally entitled to immunity in respect of *acta jure imperii*. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts. It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii*. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court will consider each of Italy's arguments in turn.

2. Italy's first argument: the territorial tort principle

62. The essence of the first Italian argument is that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii*. Italy recognizes that this argument is applicable only to those of the claims brought before the Italian courts which concern acts that occurred in Italy and not to the cases of Italian military internees taken prisoner outside Italy and transferred to Germany or other territories outside Italy as forced labour. In support of its argument Italy points to the adoption of Article 11 of the European Convention and Article 12 of the United Nations Convention and to the fact that nine of the ten States it identified which have adopted legislation specifically dealing with State immunity (the exception being Pakistan) have enacted provisions similar to those in the two Conventions. Italy acknowledges that the European Convention contains a provision to the effect that the Convention is not applicable to the acts of foreign armed forces (Article 31) but maintains that this provision is merely a saving clause aimed primarily at avoiding conflicts between the Convention and instruments regulating the status of visiting forces present with the consent of the territorial sovereign and that it does not show that States are entitled to immunity in respect of the acts of their armed forces in another State. Italy dismisses the significance of certain statements (discussed in paragraph 69 below) made during the process of adoption of the United Nations Convention suggesting that that Convention did not apply to the acts of armed forces. Italy also notes that two of the national statutes (those of the United Kingdom and Singapore) are not applicable to the acts of foreign armed forces but argues that the other seven (those of Argentina, Australia, Canada, Israel, Japan, South Africa and the United States of America) amount to significant State practice asserting jurisdiction over torts occasioned by foreign armed forces.

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63. Germany maintains that, in so far as they deny a State immunity in respect of *acta jure imperii*, neither Article 11 of the European Convention, nor Article 12 of the United Nations Convention reflects customary international law. It contends that, in any event, they are irrelevant to the present proceedings, because neither provision was intended to apply to the acts of armed forces. Germany also points to the fact that, with the exception of the Italian cases and the *Distomo* case in Greece, no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces, in the context of an armed conflict and that, by contrast, the courts in several States have expressly declined jurisdiction in such cases on the ground that the respondent State was entitled to immunity.

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64. The Court begins by observing that the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other "insurable risks". The limitation of immunity recognized by some national courts in such cases was treated as confined to *acta jure gestionis* (see, e.g., the judgment of the Supreme Court of Austria in *Holubek* v. *Government of the United States of America* (*Juristische Blätter* (Wien), Vol. 84, 1962, p. 43; *ILR*, Vol. 40, p. 73)). The Court notes, however, that none of the national legislation which provides for a "territorial tort exception" to immunity expressly distinguishes between *acta jure gestionis* and *acta jure imperii*. The Supreme Court of Canada expressly rejected the suggestion that the exception in the Canadian legislation was subject to such a distinction (*Schreiber* v. *Federal Republic of Germany*, [2002] *Supreme Court Reports (SCR)*, Vol. 3, p. 269, paras. 33-36). Nor is such a distinction featured in either Article 11 of the European Convention or Article 12 of the United Nations Convention. The International Law Commission's commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis* (*Yearbook of the International Law Commission*, 1991, Vol. II (2), p. 45, para. 8). Germany has not, however, been alone in suggesting that, in so far as it was intended to apply to *acta jure imperii*, Article 12 was not representative of customary international law. In criticizing the International Law Commission's draft of what became Article 12, China commented in 1990 that "the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts" (United Nations doc. A/C.6/45/SR.25, p. 2) and the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 "must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*" since to extend jurisdiction without regard to that distinction "would be contrary to the existing principles of international law" (United Nations doc. A/C.6/59/SR.13, p. 10, para. 63).

65. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a "tort exception" to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

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66. The Court will first consider whether the adoption of Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy's contention that States are no longer entitled to immunity in respect of the type of acts specified in the preceding paragraph. As the Court has already explained (see paragraph 54 above), neither Convention is in force between the Parties to the present case. The provisions of these Conventions are, therefore, relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

67. Article 11 of the European Convention states the territorial tort principle in broad terms,

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

That provision must, however, be read in the light of Article 31, which provides,

> "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."

Although one of the concerns which Article 31 was intended to address was the relationship between the Convention and the various agreements on the status of visiting forces, the language of Article 31 makes clear that it is not confined to that matter and excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. The Explanatory Report on the Convention, which contains a detailed commentary prepared as part of the negotiating process, states in respect of Article 31,

> "The Convention is not intended to govern situations which may arise in the event of armed conflict; *nor* can it be invoked to resolve problems which may arise between allied States as a result of the stationing of forces. These problems are generally dealt with by special agreements (cf. Article 33).
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> [Article 31] prevents the Convention being interpreted as having any influence upon these matters." (Paragraph 116; emphasis added.)

68. The Court agrees with Italy that Article 31 takes effect as a "saving clause", with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. The consequence, however, is that the inclusion of the "territorial tort principle" in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity

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for torts committed by its armed forces. As the Explanatory Report states, the effect of Article 31 is that the Convention has no influence upon that question. Courts in Belgium (judgment of the Court of First Instance of Ghent in *Botelberghe* v. *German State*, 18 February 2000), Ireland (judgment of the Supreme Court in *McElhinney* v. *Williams*, 15 December 1995, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691), Slovenia (*case No. Up-13/99*, Constitutional Court, para. 13), Greece (*Margellos* v. *Federal Republic of Germany*, *case No. 6/2002*; *ILR*, Vol. 129, p. 529) and Poland (Judgment of the Supreme Court of Poland, *Natoniewski* v. *Federal Republic of Germany, Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299) have concluded that Article 31 means that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention.

69. Article 12 of the United Nations Convention provides,

> "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

Unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the International Law Commission's commentary on the text of Article 12 states that that provision does not apply to "situations involving armed conflicts" (*Yearbook of the International Law Commission*, 1991, Vol. II (2), p. 46, para. 10). Moreover, in presenting to the Sixth Committee of the General Assembly the Report of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property (United Nations doc. A/59/22), the Chairman of the *Ad Hoc* Committee stated that the draft Convention had been prepared on the basis of a general understanding that military activities were not covered (United Nations doc. A/C.6/59/SR.13, p. 6, para. 36).

No State questioned this interpretation. Moreover, the Court notes that two of the States which have so far ratified the Convention, Norway and Sweden, made declarations in identical terms stating their understanding that "the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties" (United Nations doc. C.N.280.2006.TREATIES-2 and United Nations doc. C.N.912.2009.TREATIES-1). In the light of these various statements, the Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict.

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70. Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State (United States of America Foreign Sovereign Immunities Act 1976, 28 USC, Section 1605 *(a)* (5); United Kingdom State Immunity Act 1978, Section 5; South Africa Foreign States Immunities Act 1981, Section 6; Canada State Immunity Act 1985, Section 6; Australia Foreign States Immunities Act 1985, Section 13; Singapore State Immunity Act 1985, Section 7; Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, Article 2 *(e)*; Israel Foreign State Immunity Law 2008, Section 5; and Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, 2009, Article 10). Only Pakistan's State Immunity Ordinance 1981 contains no comparable provision.

71. Two of these statutes (the United Kingdom State Immunity Act 1978, Section 16 (2) and the Singapore State Immunity Act 1985, Section 19 (2) *(a)*) contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. The corresponding provisions in the Canadian, Australian and Israeli statutes exclude only the acts of visiting forces present with the consent of the host State or matters covered by legislation regarding such visiting forces (Canada State Immunity Act 1985, Section 16; Australia Foreign States Immunities Act 1985, Section 6; Israel Foreign State Immunity Law 2008, Section 22). The legislation of Argentina, South Africa and Japan contains no exclusion clause. However, the Japanese statute (in Article 3) states that its provisions "shall not affect the privileges or immunities enjoyed by a foreign State . . . based on treaties or the established international law".

The United States Foreign Sovereign Immunities Act 1976 contains no provision specifically addressing claims relating to the acts of foreign armed forces but its provision that there is no immunity in respect of claims "in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State" (Sec. 1605 *(a)* (5)) is subject to an exception for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused" (Sec. 1605 *(a)* (5) (A)). Interpreting this provision, which has no counterpart in the legislation of other States, a court in the United States has held that a foreign State whose agents committed an assassination in the United States was not entitled to immunity (*Letelier* v. *Republic of Chile* (1980) *Federal Supplement (F. Supp.)*, Vol. 488, p. 665; *ILR*, Vol. 63, p. 378 (United States District Court, District of Columbia)). However, the Court is not aware of any case in the United States where the courts have been called upon to apply this provision to acts performed by the armed forces and associated organs of foreign States in the course of an armed conflict.

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Indeed, in none of the seven States in which the legislation contains no general exclusion for the acts of armed forces, have the courts been called upon to apply that legislation in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict.

72. The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. The question whether a State is entitled to immunity in proceedings concerning torts allegedly committed by its armed forces when stationed on or visiting the territory of another State, with the consent of the latter, has been considered by national courts on a number of occasions. Decisions of the courts of Egypt (*Bassionni Amrane* v. *John*, *Gazette des Tribunaux mixtes d'Egypte*, January 1934, p. 108; *Annual Digest*, Vol. 7, p. 187), Belgium (*S.A. Eau, gaz, électricité et applications* v. *Office d'Aide Mutuelle*, *Cour d'Appel*, Brussels, *Pasicrisie belge*, 1957, Vol. 144, 2nd part, p. 88; *ILR*, Vol. 23, p. 205) and Germany (*Immunity of the United Kingdom*, Court of Appeal of Schleswig, *Jahrbuch für Internationales Recht*, Vol. 7, 1957, p. 400; *ILR*, Vol. 24, p. 207) are earlier examples of national courts according immunity where the acts of foreign armed forces were characterized as *acta jure imperii*. Since then, several national courts have held that a State is immune with respect to damage caused by warships (*United States of America* v. *Eemshaven Port Authority*, Supreme Court of the Netherlands, *Nederlandse Jurisprudentie*, 2001, No. 567; *ILR*, Vol. 127, p. 225; *Allianz Via Insurance* v. *United States of America* (1999), *Cour d'Appel*, Aix-en-Provence, 2nd Chamber, judgment of 3 September 1999, *ILR*, Vol. 127, p. 148) or military exercises (*FILT-CGIL Trento* v. *United States of America*, Italian Court of Cassation, *Rivista di diritto internazionale*, Vol. 83, 2000, p. 1155; *ILR*, Vol. 128, p. 644). The United Kingdom courts have held that customary international law required immunity in proceedings for torts committed by foreign armed forces on United Kingdom territory if the acts in question were *acta jure imperii* (*Littrell* v. *United States of America (No. 2)*, Court of Appeal, [1995] 1 *Weekly Law Reports (WLR)* 82; *ILR*, Vol. 100, p. 438; *Holland* v. *Lampen-Wolfe*, House of Lords [2000] 1 *WLR* 1573; *ILR*, Vol. 119, p. 367).

The Supreme Court of Ireland held that international law required that a foreign State be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces even when on the territory of the forum State without the forum State's permission (*McElhinney* v. *Williams*, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691). The Grand Chamber of the European Court of Human Rights later held that this decision reflected a widely held view of international law so that the grant of immunity could not be regarded as incompatible with the European Convention on Human Rights (*McElhinney* v. *Ireland* [GC], Application No. 31253/96, Judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 39; *ILR*, Vol. 123, p. 73, para. 38).

While not directly concerned with the specific issue which arises in the present case, these judicial decisions, which do not appear to have been contradicted in any other national court judgments, suggest that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.

73. The Court considers, however, that for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict. All of those cases, the facts of

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which are often very similar to those of the cases before the Italian courts, concern the events of the Second World War. In this context, the *Cour de cassation* in France has consistently held that Germany was entitled to immunity in a series of cases brought by claimants who had been deported from occupied French territory during the Second World War (*No. 02-45961*, 16 December 2003, *Bull. civ.*, 2003, I, No. 258, p. 206 (the *Bucheron* case); *No. 03-41851*, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and *No. 04-47504*, 3 January 2006 (the *Grosz* case)). The Court also notes that the European Court of Human Rights held in *Grosz* v. *France* (Application No. 14717/06, Decision of 16 June 2009) that France had not contravened the European Convention on Human Rights in the proceedings which were the subject of the 2006 *Cour de cassation* judgment *(Judgment 04-47504)*, because the *Cour de cassation* had given effect to an immunity required by international law.

74. The highest courts in Slovenia and Poland have also held that Germany was entitled to immunity in respect of unlawful acts perpetrated on their territory by its armed forces during the Second World War. In 2001 the Constitutional Court of Slovenia ruled that Germany was entitled to immunity in an action brought by a claimant who had been deported to Germany during the German occupation and that the Supreme Court of Slovenia had not acted arbitrarily in upholding that immunity (*Case No. Up-13/99*, Judgment of 8 March 2001). The Supreme Court of Poland held, in *Natoniewski* v. *Federal Republic of Germany* (Judgment of 29 October 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), that Germany was entitled to immunity in an action brought by a claimant who in 1944 had suffered injuries when German forces burned his village in occupied Poland and murdered several hundred of its inhabitants. The Supreme Court, after an extensive review of the decisions in *Ferrini*, *Distomo* and *Margellos*, as well as the provisions of the European Convention and the United Nations Convention and a range of other materials, concluded that States remained entitled to immunity in respect of torts allegedly committed by their armed forces in the course of an armed conflict. Judgments by lower courts in Belgium (Judgment of the Court of First Instance of Ghent in 2000 in *Botelberghe* v. *German State*), Serbia (Judgment of the Court of First Instance of Leskovac, 1 November 2001) and Brazil (*Barreto* v. *Federal Republic of Germany*, Federal Court, Rio de Janeiro, Judgment of 9 July 2008 holding Germany immune in proceedings regarding the sinking of a Brazilian fishing vessel by a German submarine in Brazilian waters) have also held that Germany was immune in actions for acts of war committed on their territory or in their waters.

75. Finally, the Court notes that the German courts have also concluded that the territorial tort principle did not remove a State's entitlement to immunity under international law in respect of acts committed by its armed forces, even where those acts took place on the territory of the forum State (Judgment of the Federal Supreme Court of 26 June 2003 (*Greek citizens* v. *Federal Republic of Germany*, case No. III ZR 245/98, *NJW*, 2003, p. 3488; *ILR*, Vol. 129, p. 556), declining to give effect in Germany to the Greek judgment in the *Distomo* case on the ground that it had been given in breach of Germany's entitlement to immunity).

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76. The only State in which there is any judicial practice which appears to support the Italian argument, apart from the judgments of the Italian courts which are the subject of the present proceedings, is Greece. The judgment of the Hellenic Supreme Court in the *Distomo* case in 2000 contains an extensive discussion of the territorial tort principle without any suggestion that it does not extend to the acts of armed forces during an armed conflict. However, the Greek Special Supreme Court, in its judgment in *Margellos* v. *Federal Republic of Germany* (case No. 6/2002) (*ILR*, Vol. 129, p. 525), repudiated the reasoning of the Supreme Court in *Distomo* and held that Germany was entitled to immunity. In particular, the Special Supreme Court held that the territorial tort principle was not applicable to the acts of the armed forces of a State in the conduct of armed conflict. While that judgment does not alter the outcome in the *Distomo* case, a matter considered below, Greece has informed the Court that courts and other bodies in Greece faced with the same issue of whether immunity is applicable to torts allegedly committed by foreign armed forces in Greece are required to follow the stance taken by the Special Supreme Court in its decision in *Margellos* unless they consider that customary international law has changed since the *Margellos* judgment. Germany has pointed out that, since the judgment in *Margellos* was given, no Greek court has denied immunity in proceedings brought against Germany in respect of torts allegedly committed by German armed forces during the Second World War and in a 2009 decision *(Decision 853/2009)*, the Supreme Court, although deciding the case on a different ground, approved the reasoning in *Margellos*. In view of the judgment in *Margellos* and the dictum in the 2009 case, as well as the decision of the Greek Government not to permit enforcement of the *Distomo* judgment in Greece itself and the Government's defence of that decision before the European Court of Human Rights in *Kalogeropoulou and others* v. *Greece and Germany* (Application No. 59021/00, Decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537), the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument.

77. In the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76).

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79. The Court therefore concludes that, contrary to what had been argued by Italy in the present proceedings, the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy's second argument: the subject-matter and circumstances of the claims in the Italian courts

80. Italy's second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms *(jus cogens)*. Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court will consider each of these strands in turn, while recognizing that, in the oral proceedings, Italy also contended that its courts had been entitled to deny State immunity because of the combined effect of these three strands.

A. The gravity of the violations

81. The first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943-1945). In the present case, the Court has already made clear (see paragraph 52 above) that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

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83. That said, the Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. Although the Hellenic Supreme Court in the *Distomo* case adopted a form of that proposition, the Special Supreme Court in *Margellos* repudiated that approach two years later. As the Court has noted in paragraph 76 above, under Greek law it is the stance adopted in *Margellos* which must be followed in later cases unless the Greek courts find that there has been a change in customary international law since 2002, which they have not done. As with the territorial tort principle, the Court considers that Greek practice, taken as a whole, tends to deny that the proposition advanced by Italy has become part of customary international law.

84. In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

85. That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, (2004) *Dominion Law Reports (DLR)* 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586; allegations of torture), France (Judgment of the Court of Appeal of Paris, 9 September 2002, and *Cour de cassation, No. 02-45961*, 16 December 2003, *Bull. civ.*, 2003, I, No. 258, p. 206 (the *Bucheron* case); *Cour de cassation, No. 03-41851*, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and *Cour de cassation, No. 04-47504*, 3 January 2006 (the *Grosz* case); allegations of crimes against humanity), Slovenia (*case No. Up-13/99*, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *New Zealand Administrative Reports (NZAR)*, p. 420; *ILR* Vol. 141, p. 702; allegations of torture), Poland (*Natoniewski*, Supreme Court, 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299; allegations of war crimes and crimes against humanity) and the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords [2007] I *Appeal Cases (AC)* 270; *ILR*, Vol. 129, p. 629; allegations of torture).

86. The Court notes that, in its response to a question posed by a Member of the Court, Italy itself appeared to demonstrate uncertainty about this aspect of its case. Italy commented,

> "Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the State is entitled to invoke the defence of sovereign immunity . . . While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity — namely a rule denying immunity with respect to every claim for compensation arising out [of] international crimes."

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A similar uncertainty is evident in the orders of the Italian Court of Cassation in *Mantelli* and *Maietta* (Orders of 29 May 2008).

87. The Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* ([2000] 1 *AC* 147; *ILR*, Vol. 119, p. 136) is relevant, notwithstanding the reliance placed on that judgment by the Italian Court of Cassation in *Ferrini*. *Pinochet* concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The distinction between the immunity of the official in the former type of case and that of the State in the latter case was emphasized by several of the judges in *Pinochet* (Lord Hutton at pp. 254 and 264, Lord Millett at p. 278 and Lord Phillips at pp. 280-281). In its later judgment in *Jones* v. *Saudi Arabia* ([2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), the House of Lords further clarified this distinction, Lord Bingham describing the distinction between criminal and civil proceedings as "fundamental to the decision" in *Pinochet* (para. 32). Moreover, the rationale for the judgment in *Pinochet* was based upon the specific language of the 1984 United Nations Convention against Torture, which has no bearing on the present case.

88. With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act, first adopted in 1996. That amendment withdraws immunity for certain specified acts (for example, torture and extra-judicial killings) if allegedly performed by a State which the United States Government has "designated as a State sponsor of terrorism" (28 *USC* 1605A). The Court notes that this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.

89. It is also noticeable that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in the European Convention, the United Nations Convention or the draft Inter-American Convention. The absence of any such provision from the United Nations Convention is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration. In 1999 the International Law Commission established a Working Group which considered certain developments in practice regarding some issues of State immunity which had been identified by the Sixth Committee of the General Assembly. In an appendix to its report, the Working Group referred, as an additional matter, to developments regarding claims "in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*" and stated that this issue was one which should not be ignored, although it did not recommend any amendment to the text of the International Law Commission Articles (*Yearbook of the International Law Commission*, 1999, Vol. II (2), pp. 171-172). The matter was then considered by the Working Group established by the Sixth Committee of the General Assembly, which reported later in 1999 that it had decided not to take up the matter as "it did not seem to be ripe enough for the Working Group to engage in a codification exercise over it" and commented that it was for the Sixth

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Committee to decide what course of action, if any, should be taken (United Nations doc. A/C.6/54/L.12, p. 7, para. 47). During the subsequent debates in the Sixth Committee no State suggested that a *jus cogens* limitation to immunity should be included in the Convention. The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy.

90. The European Court of Human Rights has not accepted the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law. In 2001, the Grand Chamber of that Court, by the admittedly narrow majority of nine to eight, concluded that,

> "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged." (*Al-Adsani* v. *United Kingdom* [GC], Application No. 35763/97, Judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 101, para. 61; *ILR*, Vol. 123, p. 24.)

The following year, in *Kalogeropoulou and others* v. *Greece and Germany*, the European Court of Human Rights rejected an application relating to the refusal of the Greek Government to permit enforcement of the *Distomo* judgment and said that,

> "The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity." (Application No. 59021/00, Decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537.)

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

B. The relationship between *jus cogens* and the rule of State immunity

92. The Court now turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules

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always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

95. To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which

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no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo (New Application: 2002), Judgment, I.C.J. Reports 2006*, p. 6, paras. 64 and 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 3, paras. 58 and 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (*case No. Up-13/99*, Constitutional Court of Slovenia), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *NZAR* p. 420; *ILR*, Vol. 141, p. 702), and Greece (*Margellos*, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani* v. *United Kingdom* and *Kalogeropoulou and others* v. *Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne* v. *Libyan Arab Jamahiriya* (No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The *Cour de cassation* in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of *jus cogens* are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected.

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C. The "last resort" argument

98. The third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. Germany's response is that in the aftermath of the Second World War it made considerable financial and other sacrifices by way of reparation in the context of a complex series of inter-State arrangements under which, reflecting the economic realities of the time, no Allied State received compensation for the full extent of the losses which its people had suffered. It also points to the payments which it made to Italy under the terms of the two 1961 Agreements and to the payments made more recently under the 2000 Federal Law to various Italians who had been unlawfully deported to forced labour in Germany. Italy maintains, however, that large numbers of Italian victims were nevertheless left without any compensation.

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99. The Court notes that Germany has taken significant steps to ensure that a measure of reparation was made to Italian victims of war crimes and crimes against humanity. Nevertheless, Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour (see paragraph 26 above). The overwhelming majority of Italian military internees were, in fact, denied treatment as prisoners of war by the Nazi authorities. Notwithstanding that history, in 2001 the German Government determined that those internees were ineligible for compensation because they had had a legal entitlement to prisoner-of-war status. The Court considers that it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.

100. Moreover, as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. 25, para. 60; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008,* p. 244, para. 196). In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.

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101. That notwithstanding, the Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims, entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention.

102. Moreover, the Court cannot fail to observe that the application of any such condition, if it indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the present case, when claims have been the subject of extensive intergovernmental discussion. If one follows the Italian argument, while such discussions were still ongoing and had a prospect of achieving a successful outcome, then it seems that immunity would still prevail, whereas, again according to this argument, immunity would presumably cease to apply at some point when prospects for an inter-State settlement were considered to have disappeared. Yet national courts in one of the countries concerned are unlikely to be well placed to determine when that point has been reached. Moreover, if a lump sum settlement has been made — which has been the normal practice in the aftermath of war, as Italy recognizes — then the determination of whether a particular claimant continued to have an entitlement to compensation would entail an investigation by the court of the details of that settlement and the manner in which the State which had received funds (in this case the State in which the court in question is located) has distributed those funds. Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.

103. The Court therefore rejects Italy's argument that Germany could be refused immunity on this basis.

104. In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned.

It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.

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D. The combined effect of the circumstances relied upon by Italy

105. In the course of the oral proceedings, counsel for Italy maintained that the three strands of Italy's second argument had to be viewed together; it was because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress that the Italian courts had been justified in refusing to accord immunity to Germany.

106. The Court has already held that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that effect if taken together. Nothing in the examination of State practice lends support to the proposition that the concurrent presence of two, or even all three, of these elements would justify the refusal by a national court to accord to a respondent State the immunity to which it would otherwise be entitled.

In so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity. As explained in paragraph 56 above, according to international law, State immunity, where it exists, is a right of the foreign State. In addition, as explained in paragraph 82 of this Judgment, national courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.

4. Conclusions

107. The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

108. It is, therefore, unnecessary for the Court to consider a number of questions which were discussed at some length by the Parties. In particular, the Court need not rule on whether, as Italy contends, international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation. Nor need it rule on whether, as Germany maintains, Article 77, paragraph 4, of the Treaty of Peace or the provisions of the 1961 Agreements amounted to a binding waiver of the claims which are the subject of the Italian proceedings. That is not to say, of course, that these are unimportant questions, only that they are not ones which fall for decision within the limits of the present case. The question whether Germany still has a responsibility towards Italy, or individual Italians, in respect of war crimes and crimes against humanity committed by it during the Second World War does not affect Germany's entitlement to immunity. Similarly, the Court's ruling on the issue of immunity can have no effect on whatever responsibility Germany may have.

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IV. THE MEASURES OF CONSTRAINT TAKEN AGAINST PROPERTY BELONGING TO GERMANY LOCATED ON ITALIAN TERRITORY

109. On 7 June 2007, certain Greek claimants, in reliance on a decision of the Florence Court of Appeal of 13 June 2006, declaring enforceable in Italy the judgment rendered by the Court of First Instance of Livadia, in Greece, which had ordered Germany to pay them compensation, entered in the Land Registry of the Province of Como a legal charge against Villa Vigoni, a property of the German State located near Lake Como (see above, paragraph 35).

110. Germany argued before the Court that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law. Italy has not sought to justify that measure; on the contrary, it indicated to the Court that it "has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled".

111. As a result of Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the charge in question was suspended in order to take account of the pending proceedings before the Court in the present case. It has not, however, been cancelled.

112. The Court considers that, notwithstanding the above-mentioned suspension, and the absence of any argument by Italy seeking to establish the international legality of the measures of constraint in question, a dispute still exists between the Parties on this issue the subject of which has not disappeared. Italy has not formally admitted that the legal charge on Villa Vigoni constituted a measure contrary to its international obligations. Nor, as just stated, has it put an end to the effects of that measure, but has merely suspended them. It has told the Court, through its Agent, that the decisions of the Italian courts rendered against Germany have been suspended by legislation pending the decision of this Court, and that execution of those decisions "will only occur should the Court decide that Italy has not committed the wrongful acts complained of by Germany". That implies that the charge on Villa Vigoni might be reactivated, should the Court conclude that it is not contrary to international law. Without asking the Court to reach such a conclusion, Italy does not exclude it, and awaits the Court's ruling before taking the appropriate action thereon.

It follows that the Court should rule, as both Parties wish it to do, on the second of Germany's Submissions, which concerns the dispute over the measure of constraint taken against Villa Vigoni.

113. Before considering whether the claims of the Applicant on this point are well-founded, the Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

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The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.

114. In the present case, this means that the Court may rule on the issue of whether the charge on Villa Vigoni constitutes a measure of constraint in violation of Germany's immunity from enforcement, without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against Germany, for purposes of whose enforcement that measure was taken, were themselves in breach of that State's jurisdictional immunity.

Likewise, the issue of the international legality of the measure of constraint in question, in light of the rules applicable to immunity from enforcement, is separate — and may therefore be considered separately — from that of the international legality, under the rules applicable to jurisdictional immunity, of the decisions of the Italian courts which declared enforceable on Italian territory the Greek judgments against Germany. This latter question, which is the subject of the third of the submissions presented to the Court by Germany (see above paragraph 17), will be addressed in the following section of this Judgment.

115. In support of its claim on the point under discussion here, Germany cited the rules set out in Article 19 of the United Nations Convention. That Convention has not entered into force, but in Germany's view it codified, in relation to the issue of immunity from enforcement, the existing rules under general international law. Its terms are therefore said to be binding, inasmuch as they reflect customary law on the matter.

116. Article 19, entitled "State immunity from post-judgment measures of constraint", reads as follows:

> "No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> *(a)* the State has expressly consented to the taking of such measures as indicated:
>
> (i) by international agreement;
>
> (ii) by an arbitration agreement or in a written contract; or
>
> (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
>
> *(b)* the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
>
> *(c)* it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

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117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.

118. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim (an illustration of this well-established practice is provided by the decision of the German Constitutional Court *(Bundesverfassungsgericht)* of 14 December 1977 (*BVerfGE*, Vol. 46, p. 342; *ILR*, Vol. 65, p. 146), by the judgment of the Swiss Federal Tribunal of 30 April 1986 in *Kingdom of Spain* v. *Société X* (*Annuaire suisse de droit international*, Vol. 43, 1987, p. 158; *ILR*, Vol. 82, p. 44), as well as the judgment of the House of Lords of 12 April 1984 in *Alcom Ltd* v. *Republic of Colombia* ([1984] 1 *AC* 580; *ILR*, Vol. 74, p. 170) and the judgment of the Spanish Constitutional Court of 1 July 1992 in *Abbott* v. *Republic of South Africa* (*Revista española de derecho internacional*, Vol. 44, 1992, p. 565; *ILR*, Vol. 113, p. 414)).

119. It is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany's sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. This cultural centre is organized and administered on the basis of an agreement between the two Governments concluded in the form of an exchange of notes dated 21 April 1986. Before the Court, Italy described the activities in question as a "centre of excellence for the Italian-German co-operation in the fields of research, culture and education", and recognized that Italy was directly involved in "its peculiar bi-national . . . managing structure". Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

120. In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. THE DECISIONS OF THE ITALIAN COURTS DECLARING ENFORCEABLE IN ITALY DECISIONS OF GREEK COURTS UPHOLDING CIVIL CLAIMS AGAINST GERMANY

121. In its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre. In 1995, successors in title of the victims of that massacre, committed by the German armed forces in a Greek village in June 1944, brought proceedings for compensation against Germany before the

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Greek courts. By a judgment of 25 September 1997, the Court of First Instance of Livadia, which had territorial jurisdiction, ordered Germany to pay compensation to the claimants. The appeal by Germany against that judgment was dismissed by a decision of the Hellenic Supreme Court of 4 May 2000, which rendered final the judgment of the Court of First Instance, and at the same time ordered Germany to pay the costs of the appeal proceedings. The successful Greek claimants under the first-instance and Supreme Court judgments applied to the Italian courts for *exequatur* of those judgments, so as to be able to have them enforced in Italy, since it was impossible to enforce them in Greece or in Germany (see above, paragraphs 30 and 32). It was on those applications that the Florence Court of Appeal ruled, allowing them by a decision of 13 June 2006, which was confirmed, following an objection by Germany, on 21 October 2008 as regards the pecuniary damages awarded by the Court of First Instance of Livadia, and by a decision of 2 May 2005, confirmed, following an objection by Germany, on 6 February 2007 as regards the award of costs made by the Hellenic Supreme Court. This latter decision was confirmed by the Italian Court of Cassation on 6 May 2008. As regards the decision confirming the *exequatur* granted in respect of the judgment of the Court of First Instance of Livadia, it has also been appealed to the Italian Court of Cassation, which dismissed that appeal on 12 January 2011.

122. According to Germany, the decisions of the Florence Court of Appeal declaring enforceable the judgments of the Livadia court and the Hellenic Supreme Court constitute violations of its jurisdictional immunity, since, for the same reasons as those invoked by Germany in relation to the Italian proceedings concerning war crimes committed in Italy between 1943 and 1945, the decisions of the Greek courts were themselves rendered in violation of that jurisdictional immunity.

123. According to Italy, on the contrary, and for the same reasons as those set out and discussed in Section III of the present Judgment, there was no violation of Germany's jurisdictional immunity, either by the decisions of the Greek courts or by those of the Italian courts which declared them enforceable in Italy.

124. It should first be noted that the claim in Germany's third submission is entirely separate and distinct from that set out in the preceding one, which has been discussed in Section IV above (paragraphs 109 to 120). The Court is no longer concerned here to determine whether a measure of constraint — such as the legal charge on Villa Vigoni — violated Germany's immunity from enforcement, but to decide whether the Italian judgments declaring enforceable in Italy the pecuniary awards pronounced in Greece did themselves — independently of any subsequent measure of enforcement — constitute a violation of the Applicant's immunity from jurisdiction. While there is a link between these two aspects — since the measure of constraint against Villa Vigoni could only have been imposed on the basis of the judgment of the Florence Court of Appeal according *exequatur* in respect of the judgment of the Greek court in Livadia — the two issues nonetheless remain clearly distinct. That discussed in the preceding section related to immunity from enforcement; that which the Court will now consider addresses immunity from jurisdiction. As recalled above, these two forms of immunity are governed by different sets of rules.

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125. The Court will then explain how it views the issue of jurisdictional immunity in relation to a judgment which rules not on the merits of a claim brought against a foreign State, but on an application to have a judgment rendered by a foreign court against a third State declared enforceable on the territory of the State of the court where that application is brought (a request for *exequatur*). The difficulty arises from the fact that, in such cases, the court is not being asked to give judgment directly against a foreign State invoking jurisdictional immunity, but to enforce a decision already rendered by a court of another State, which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State.

126. In the present case, the two Parties appear to have argued on the basis that, in such a situation, the question whether the court seised of the application for *exequatur* had respected the jurisdictional immunity of the third State depended simply on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. In other words, both Parties appeared to make the question whether or not the Florence Court of Appeal had violated Germany's jurisdictional immunity in declaring enforceable the Livadia and Hellenic Supreme Court decisions dependent on whether those decisions had themselves violated the jurisdictional immunity on which Germany had relied in its defence against the proceedings brought against it in Greece.

127. There is nothing to prevent national courts from ascertaining, before granting *exequatur*, that the foreign judgment was not rendered in breach of the immunity of the respondent State. However, for the purposes of the present case, the Court considers that it must address the issue from a significantly different viewpoint. In its view, it is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany's jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity — something, moreover, which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings (see *Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 34).

The relevant question, from the Court's point of view and for the purposes of the present case, is whether the Italian courts did themselves respect Germany's immunity from jurisdiction in allowing the application for *exequatur*, and not whether the Greek court having rendered the judgment of which *exequatur* is sought had respected Germany's jurisdictional immunity. In a situation of this kind, the replies to these two questions may not necessarily be the same; it is only the first question which the Court needs to address here.

128. Where a court is seised, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.

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129. In this regard, the Court notes that, under the terms of Article 6, paragraph 2, of the United Nations Convention:

> "A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
>
> *(a)* is named as a party to that proceeding; or
>
> *(b)* is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State."

When applied to *exequatur* proceedings, that definition means that such proceedings must be regarded as being directed against the State which was the subject of the foreign judgment. That is indeed why Germany was entitled to object to the decisions of the Florence Court of Appeal granting *exequatur* — although it did so without success — and to appeal to the Italian Court of Cassation against the judgments confirming those decisions.

130. It follows from the foregoing that the court seised of an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction — having regard to the nature of the case in which that judgment was given — before the courts of the State in which *exequatur* proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State (see to this effect the judgment of the Supreme Court of Canada in *Kuwait Airways Corp.* v. *Iraq* [2010] *SCR*, Vol. 2, p. 571, and the judgment of the United Kingdom Supreme Court in *NML Capital Limited* v. *Republic of Argentina* [2011] *UKSC* 31).

131. In light of this reasoning, it follows that the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity. For the reasons set out in Section III above of the present Judgment, the Italian courts would have been obliged to grant immunity to Germany if they had been seised of the merits of a case identical to that which was the subject of the decisions of the Greek courts which it was sought to declare enforceable (namely, the case of the Distomo massacre). Accordingly, they could not grant *exequatur* without thereby violating Germany's jurisdictional immunity.

132. In order to reach such a decision, it is unnecessary to rule on the question whether the Greek courts did themselves violate Germany's immunity, a question which is not before the Court, and on which, moreover, it cannot rule, for the reasons recalled earlier. The Court will confine itself to noting, in general terms, that it may perfectly well happen, in certain circumstances, that the judgment rendered on the merits did not violate the jurisdictional immunity of the respondent State, for example because the latter had waived its immunity before the courts hearing the case on the merits, but that the *exequatur* proceedings instituted in another State are barred by the respondent's immunity. That is why the two issues are distinct, and why it is not for this Judgment to rule on the legality of the decisions of the Greek courts.

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133. The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

VI. GERMANY'S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT

134. In its final submissions at the close of the oral proceedings, Germany presented six requests to the Court, of which the first three were declaratory and the final three sought to draw the consequences, in terms of reparation, of the established violations (see paragraph 17 above). It is on those requests that the Court is required to rule in the operative part of this Judgment.

135. For the reasons set out in Sections III, IV and V above, the Court will uphold Germany's first three requests, which ask it to declare, in turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany's immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

136. In its fourth submission, Germany asks the Court to adjudge and declare that, in view of the above, Italy's international responsibility is engaged.

There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation will be considered below, in connection with Germany's fifth and sixth submissions. The Court's ruling thereon will be set out in the operative clause. On the other hand, the Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged; to do so would be entirely redundant, since that responsibility is automatically inferred from the finding that certain obligations have been violated.

137. In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable. This is to be understood as implying that the relevant decisions should cease to have effect.

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended,

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the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.

It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

138. Finally, in its sixth submission, Germany asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945).

As the Court has stated in previous cases (see, in particular, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150), as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.

In the present case, the Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany's final submissions.

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139. For these reasons,

THE COURT,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;

AGAINST: *Judges* Cançado Trindade, Yusuf; *Judge* ad hoc Gaja;

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Judge* Cançado Trindade;

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Judge* Cançado Trindade;

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Judge* Cançado Trindade;

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(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and twelve, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Government of the Hellenic Republic, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA, KEITH and BENNOUNA append separate opinions to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append dissenting opinions to the Judgment of the Court; Judge *ad hoc* GAJA appends a dissenting opinion to the Judgment of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

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MEMORANDUM

Date: January 20, 2012

To: [ ]

From: Owen Pell
Andrew Frank

Re: Briefing Points on H.R. 1193 and S. 634 (the "Holocaust Rail Justice Bills

Set forth below are Deutsche Bahn's thoughts regarding legal and policy issues prese by the Holoc aust Rail Justice Bills. We also are attaching a mark-up of proposed amendin language which was provided to us to show our proposed clarifying language. We look forw to discussing these issues with you in the near future.

1. Although apparently aimed at the French national railway (SNCF), HR-1193 and S as originally drafted, expressly apply much more broadly to include any railroad whi "was organized as a separate legal entity at the time of deportation, whether or not the equity interest in the railroad was owned by a foreign state." See Original Holc Rail Justice Bills Section 3(a)(2)(B).

    a. To the extent this original language could allow claims against Deutsche Bah AG, this would violate the U.S.- German Executive Agreement which manc legal peace with respect to Holocaust-related claims against German entitie

    b. The U.S.-German Executive Agreement was to be a complete settlement of U.S. litigation regarding Holocaust -related liability for the German governr and corporate entities (German and non -German) which contributed to the Remembrance and Future Fund set up under the U.S.- German Agreement.

    c. That settlement covered Deutsche Bahn, which contributed directly to the settlement, and through the contribution made by the Germ an government.

2. The proposed amending language for H.R. 1193 **does not** resolve all potential issu relating to the U.S.-German Agreement.

    a. As amended, H.R. 1193 does not define "railroad". Hence, it is unclear whet sovereign immunity is being denied to any entity or assets that were part of associated with any German state-owned railroad at the time of World War I are now separated from that entity. Under new Section 1605B(b), it appears t entities or assets that are no longer associated with the railroad as to which a settlement was paid could be sued. As such, the ambiguities in the propose amending language create incentives for new litigation which would undermi the purposes of the U.S.-German Agreement, including to ensure legal peac

HISTORICAL ISSUES RAISED BY H.R. 1193 and S. 634

The Railway Justice bills raise serious issues with respect to existing Holocaust settlements that were designed to end Holocaust claims as against the settling nations. By seeking to re-open the French settlement, the bills create the risk that other settlements could be reopened at any time. There is no claim that France failed to carry out its settlement. Rather, in threatening renewed litigation, the bills rest on three historical premises: (i) when the 2001 U.S.-France Holocaust settlement was reached SNCF's role in the Holocaust was not understood; (ii) SNCF was a free-standing entity during World War II; and (iii) SNCF profited from providing deportation services. None of those premises is historically correct.

1. **SNCF publicly documented its wartime history before the 2001 U.S.-France Settlement.** Public information on SNCF's history was available before the U.S.-France settlement, such that plaintiffs could have included SNCF in their claims.

    a. SNCF began a historical examination in 1992. In 1996, a 914-page two volume report on its World War II activities was published, which included a two volume appendix of historical documents. As of 1996, SNCF's archives were open to the public.[1] SNCF also issued an executive summary in English of the two volume historical report. **A copy of that summary (the "SNCF Report") is attached.**[2]

    b. The French Bank Holocaust litigation began in 1997. No claims were brought against SNCF until 2003, well after the U.S.-France settlement.

2. **Upon the fall of France, SNCF came under German Army and Vichy control.**

    a. Article 13 of the Franco-German Armistice Agreement (attached) required the national railway system in Occupied France to be made available to Germany. Although SNCF owned its equipment, "all French railroad operations, routes and inland waterways in the occupied territory [were] at the full and complete disposal of the German Head of Transportation." SNCF Report at 4. The German Head of Transportation in France was the *Wehrmachtverkehrsdirektion* ("WVD"), which was the German Army Transportation Department.

    b. A German general (Kohl) was the commander of the railway transport department in Paris. He oversaw the Reichsbahn officials who oversaw SNCF. Kohl reported to a general in Germany who reported to the German Army High Command. SNCF Report at 7-8.

    c. In 1940, although already wholly-owned by the French State, SNCF's Board was reduced from 33 to 12, and the Management Committee was eliminated so as to tighten government control. SNCF Report at 7. The WVD could and did replace SNCF officials. Id. at 5.

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[1] See http://www.sncfhighspeedrail.com/wwii-disclosure/.

[2] The report is available at http://holocaustrailvictims.org/wp-content/uploads/2010/10/Bachelier-Report_Executive-Summary.pdf.

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d. Germany expropriated and "rented" (on demand) SNCF equipment to meet German war needs – which grew dramatically as the war progressed. By late 1943, 30% of SNCF's locomotives and 52% of its freight cars had been taken for German use. SNCF Report 5-6, 10, 13-14, 20. Germany's use of rolling stock from railroads across conquered Europe was part of a plan devised by Albert Speer which envisioned centralized rolling stock management coordinated for German industrial needs. SNCF Report at 14.

e. German control of SNCF increased after November 1942 with the German occupation of Vichy France. Thereafter, Germany increasingly took SNCF employees hostage in connection with Resistance activity. As the war went on, Resistance activity involving SNCF employees increased significantly, as did German reprisals against SNCF personnel. SNCF Report at 16-18, 19-21, 22-23; see also Michael R. Marrus, *French Railways and the Deportation of Jews in 1944*, in David Bankier & Dan Michman eds., HOLOCAUST AND JUSTICE at 258 (Yad Vashem 2010) (almost 1,700 SNCF employees killed).

3. **Deportations were scheduled by the German Army and did not necessarily rely on SNCF rolling stock.**

a. French deportations were initiated and coordinated by the Reich Security Office overseen by Heydrich. Orders were passed down through the German authorities which set the conditions and schedules for each SNCF convoy. SNCF Report at 14-15.

b. Early convoys probably used *German* rolling stock because it was a German priority to get German rolling stock back to Germany or to the East. German engines were substituted at the French frontier. SNCF rolling stock used in deportations generally stayed in Germany. Id. at 15-16.

4. **There is no evidence that SNCF (or France) profited from deportations.**

a. Article 18 of the Franco-German Armistice mandated that France pay Germany for the costs of occupation. As shown on the Avalon Project database (www.avalon.law.yale.edu), this amounted to RM 20 million per day, which equaled **400 million Francs per day**. This dwarfed any fees invoiced by SNCF for deportation convoys. Other documents on that database show Vichy officials asking Germany to reduce the daily reparation, and that the *daily* fine was almost equal to the *annual* revenue of the French State.

b. Germany never fully paid SNCF the amounts invoiced for expropriated or rented equipment. SNCF sustained monthly deficits of FF 200 million on rentals alone. SNCF Report at 10, 19-20. The **total** number of SNCF rail cars used for deportations equaled roughly 15% of **one day's** rolling stock use. Id. at 15-16. Hence, even if SNCF had been paid fully for rolling stock used in deportations (which does not appear to have happened), that amount **could not** have covered the overall losses sustained by SNCF or France during the German occupation. ■

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Date: May 28, 2012

From: Owen Pell
Andrew Frank

Re: Relevance of ICJ Decision in *Germany v. Italy* to H.R. 1193 and S. 634 (the "Holocaust Rail Justice Bills")

In considering the Rail Justice bills, the importance of the recent International Court of Justice decision in *Germany v. Italy* (Feb. 3, 2012) (copy attached) should be noted. The Rail Justice bills would be a significant departure from past U.S. statements regarding State immunity under international law (statements which, among other things, are essential to protecting U.S. personnel on terrorism-related and other missions around the world). These U.S. views of State immunity were reaffirmed strongly by the World Court.

In the *Germany* case, plaintiffs with civil damage claims for war crimes committed by Germany in Italy and Greece during World War II were allowed by Italian (and Greek) courts to proceed against Germany, and enforcement had been ordered against German property in Italy to satisfy judgments. All parties conceded that war crimes and crimes against humanity had been committed. Germany, however, claimed that it was entitled to absolute immunity from jurisdiction in these civil damage actions.

The International Court of Justice ("ICJ") agreed, holding (by rulings of 12-3 and 14-1) that Italy and Greece had violated international law by not recognizing Germany's sovereign immunity from the lawsuits at issue. The ruling is significant as to the Rail Justice bills:

1. The ICJ confirmed that State immunity is part of customary international law, and is no longer simply a matter of comity (i.e., discretionary courtesy among sovereign states). ICJ Decision ¶¶ 56-57. As such, the amendments to the FSIA contemplated by the Rail Justice bills would create significant problems with our allies.

2. The acts of the German armed forces **and other State organs working in cooperation with those armed forces** in the course of conducting an armed conflict were *acta jure imperii* in that the wrongful acts involved their exercise of sovereign authority and power. ICJ Decision ¶¶ 60, 65. The ICJ ruling means that Germany's use of the national railway system of any conquered State to assist German deportations was a sovereign act associated with the German war effort. In the case of World War II, this not only is historically accurate, but means that invoicing done by national railways for the use of rail cars does not turn deportations into "commercial" activity. The railways involved were organs of the State – and in France, per the Franco-German Armistice Agreement, were under the direct control of the German military (i.e., the military of another State engaged in an armed conflict).

    (a) This part of the ICJ Decision stresses that while Germany was immune from private damage actions, individuals from Germany (and elsewhere) were **criminally** liable for their acts, **and** Germany was subject to reparation claims for

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the international law violations that occurred. Thus, the Franco-German Reparation Agreement of 1961 and the 2001 Holocaust Settlement Agreements between the United States and Germany and France, respectively, were in keeping with how international law addresses damages arising from gross violations of international law committed during wartime. Thus, by allowing damage actions against sovereign entities for acts relating to German wartime activities, the Rail Justice bills would represent a break from international law.

3. Italy argued that the general rule of sovereign immunity as to *acta jure imperii* should not apply because here the underlying claims related to torts involving death, injury or damage to property occurring in the territory of the forum state. The ICJ rejected this argument, and cited the broad language in the UN Convention on the Jurisdictional Immunities of States and Their Property (*opened for signature*, Dec. 2, 2004; not yet effective pending ratification by 30 states), upon which Italy relied.

   (a) Article 12 of the UN Convention (ICJ Decision ¶ 69) states:

   "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

   (b) The ICJ explained that a number of States had objected to this language as not properly reflecting the general rule relating to State immunity as to *acta jure imperii*. In particular, the ICJ cited a **United States** comment on Article 12, which stated that Article 12

   "'must be interpreted and applied consistently with the time-honored distinction between acts *jure imperii* and acts *jure gestionis*' [i.e., commercial or private acts] since to extend jurisdiction without regard to that distinction 'would be contrary to the existing principles of international law.'"

   ICJ Decision ¶ 64 (citing U.S. statement filed with the United Nations). The Rail Justice bills would contradict that U.S. position and would raise serious issues with respect to U.S. personnel operating abroad (including those contracted by U.S. forces) in potential or active war zones.

   (c) Based on comments from the United States and other nations, the International Law Commission commentary on the UN Convention (made in 2004) states that Article 12 "does not apply to 'situations involving armed conflicts.'" ICJ Decision ¶ 69. The ICJ noted that no State questioned this interpretation. Once again, this is a principle that has real ramifications for the United States regarding the immunity of U.S. personnel conducting missions around the world.

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4. The ICJ Decision also notes that after World War II, the United States did not dispute France's recognition of Germany's immunity from civil liability for deportations conducted from France during World War II – a decision that is consistent with what other nations conquered by Germany during World War II have decided as to State immunity. ICJ Decision ¶¶ 73-74. The Rail Justice bills would create a situation where the United States agreed with France's decision to **not** allow civil claims against Germany based on State immunity, but would then allow these very claims to be brought against France in U.S. courts.

    (a) The ICJ Decision also recognizes a territorial aspect to the claims at issue. As such, the Rail Justice bills raise serious questions of the United States allowing claims under international law to proceed with respect to persons or acts having no U.S. connection.

5. The ICJ also rejected Italy's argument that international law now recognized an exception to State immunity in cases involving allegations of serious violations of international human rights law, war crimes or crimes against humanity. In so holding, the ICJ cited decisions by the courts of the European Union, United Kingdom, Canada, France and New Zealand, among others. ICJ Decision ¶¶ 85-90. This aspect of the Decision further highlights the importance accorded to State immunity and underscores the seriousness of the foreign policy issues raised by the Rail Justice bills. ◙

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Holocaust Rail Justice Act – S. 634 / H.R. 1193 - REVISED

A BILL

To ensure that the courts of the United States may provide an impartial forum for claims brought by United States citizens and others, including the heirs and survivors of such persons, against any railroad that engaged in the transportation of United States citizens and others toward holding camps within France or was engaged in the deportation of such persons from France toward Nazi concentration camps on trains owned and operated by such railroad.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Holocaust Rail Justice Act'.

SEC. 2. CONGRESSIONAL FINDINGS.

Congress finds as follows:

(1) During World War II, more than 76,000 Jews and thousands of other persons were deported from France toward Nazi concentration camps such as Auschwitz and Buchenwald on trains owned and operated by the Societe Nationale des Chemins de fer Francais (in this Act referred to as `SNCF'). In addition, thousands of other persons were transported within France between holding camps on SNCF trains. Citizens and residents of the United States were among those who were on the trains or had relatives on the trains. United States airmen shot down over France were also among the persons deported on SNCF trains toward Nazi concentration camps.

(2) United States citizens and others sought redress against SNCF by filing a class action suit in the United States District Court for the Eastern District of New York. The named plaintiffs and class members included United States Army Air Force pilots and United States citizens.

(3) The complaint filed alleged that SNCF, a separate corporate entity that remained independent during World War II, operated the deportation trains for a profit, as ordinary commercial transactions. SNCF remained under French civilian control throughout World War II and is alleged to have collaborated willingly with the German Nazi regime.

(4) The complaint alleged that SNCF provided the necessary rolling stock, scheduled the departures, and supplied the employees to operate the trains bound for the concentration camps. SNCF allegedly charged an ordinary passenger fare for the deportations, calculated per person and per kilometer, and considered these trains as ordinary commercial activities. Those on the

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trains included the sick, elderly, pregnant women, babies, and young children. The complaint further alleged that SNCF cleaned and disinfected the cars after each trip. SNCF knew that the conditions of the cars were inhumane and often fatal.

(5) The complaint contended that SNCF's actions violated the Principles of the Nuremberg Tribunal, 1950, relating to crimes under international law (earlier recognized by the Martens Clause of the Hague Convention IV of 1907), and aided and abetted the commission of war crimes and crimes against humanity. SNCF has not denied its actions and has never disgorged the money that it was paid for the deportations or otherwise compensated the deportees or their heirs.

(6) SNCF's full records concerning the deportations have not been made available to the plaintiffs.

(7) SNCF moved to dismiss the lawsuit on a claim of sovereign immunity under the foreign sovereign immunities provisions of title 28, United States Code (28 U.S.C. 1330 and 1602 et seq.), even though it is one of the 500 largest corporations in the world, is a separate legal entity under both French law and United States law, earns hundreds of millions of dollars from its commercial activities in the United States, is not accorded sovereign immunity under the laws of France, and even though in French Administrative court SNCF was actually successful in having a case dismissed based on the argument it was a private entity (the opposite of the argument that SNCF has advanced in the United States courts). SNCF's motion to dismiss the lawsuit was granted by the United States District Court for the Eastern District of New York. Plaintiffs appealed the decision, their appeal was granted, and the case was remanded for further proceedings. Subsequently, in light of Republic of Austria v. Altmann, 541 U.S. 677 (2004), in November 2004, on remand, the Court of Appeals for the Second Circuit recalled its prior mandate and determined that SNCF was entitled to immunity and affirmed the dismissal of the complaint. The Second Circuit concluded that `the evil actions of the French national railroad's former private masters in knowingly transporting thousands to death camps during World War II are not susceptible to legal redress in Federal court today.'.

(8) There are no treaties or relevant executive agreements between the United States and France related to reparations and/or restitution for personal injury or death resulting from (a) the transportation of persons within France toward holding camps during the period beginning on June 22, 1940, and ending on December 31, 1944, or (2) the deportation of persons from France toward Nazi concentration camps during the period beginning on June 22, 1940, and ending on December 31, 1944.

(9) This lawsuit, which arose from the deportation of persons from France toward Nazi concentration camps, presented issues of substantial importance to citizens and veterans of the United States. Further, French courts are effectively closed to any legal actions against SNCF arising from the deportations. The courts of the United States are and should be a proper forum for this lawsuit. The Foreign Sovereign Immunities Act of 1976, which had not been enacted at the time of SNCF's actions during World War II, was not intended to bar suit against the SNCF.

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SEC. 3. ACCESS TO UNITED STATES COURTS FOR HOLOCAUST DEPORTEES.

(a) Holocaust Rail Exception to Immunity.—

(1) In General.—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605A the following:

"§1605B. Holocaust Rail Exception to the Jurisdictional Immunity of a Foreign State

"(a) In General.-

"(1) No Immunity. – An agency or instrumentality of a foreign state as defined in Section 1603(b) shall not be immune from the jurisdiction of the courts of the United States or of the states in any case in which money damages are sought against such agency or instrumentality for personal injury or death that--

"(A) arose from (i) the transportation of persons within France toward holding camps during the period beginning on June 22 , 1940, and ending on December 31, 1944, or (ii) the deportation of persons from France toward Nazi concentration camps during the period beginning on June 22, 1940, and ending on December 31, 1944; and

"(B) is brought by any such person, or any heir or survivor of such person, against a railroad that--

(i) owned and operated the trains during the time the persons were so transported or deported; and,

(ii) was, at the time of the transportations or deportations, a separate legal entity, whether or not any or all of the equity interest in the railroad was or is owned by a foreign state.

~~"(b) Section (a)(1) shall not apply to any railroad that is an agency or instrumentality of a foreign state as defined in Section 1603(b) that has contributed, as of January 1, 2010, to any fund established under an agreement of the United States of America to resolve Holocaust-related claims in United States courts.~~

"(b~~e~~) Inapplicability of Statutes of Limitation- An action described in subsection (a) shall not be barred by a defense that the time for bringing such action has expired under a statute of limitations.

"(c~~d~~) Applicability

"(1) –This section shall apply to any action pending on January 1, 2002, and to any action commenced on or after that date.

"(2) This Section shall not apply to any railroad or other person (or their assets) as to which a contribution has been made, including by a foreign state, to any fund established under an agreement of the United States of America to resolve Holocaust-related claims in United States courts. As used in this Section, "person" shall mean a separate legal person, corporate or

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otherwise, including a foreign state or an agency or instrumentality of a foreign state, as those terms are defined in Section 1603 of title 28, United States Code.

"(3) Nothing in this Act is intended to otherwise amend, alter or modify a prior agreement of the United States of America to resolve Holocaust-related claims in United States courts."

SEC. 4. REPORTING.

In furtherance of international education relating to the Holocaust and historic and continuing anti-Semitism in Europe and throughout the world, the Secretary of State shall submit to the Congress a one-time report, outlining the status of access to wartime records and archives concerning the wartime activities of any railroad that engaged in (a) the transportation of persons within France toward holding camps during the period beginning on June 22, 1940, and ending on December 31, 1944, or (b) the deportation of persons from France toward Nazi concentration camps during the period beginning on June 22, 1940, and ending on December 31, 1944.

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